[redacted]

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 621

MINNESOTA MINING AND MANUFACTURING COMPANY, APPELLANT,

vs.

WISCONSIN DEPARTMENT OF TAXATION

APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 14, 1944.

[fol. 1] **SUPREME COURT OF THE UNITED STATES**

[File endorsement omitted]

MINNESOTA MINING & MANUFACTURING COMPANY, Appellant,

vs.

WISCONSIN DEPARTMENT OF TAXATION, Appellee

ORDER ALLOWING APPEAL AND FIXING BOND—Filed December 11, 1943

The petition of Minnesota Mining & Manufacturing Company, appellant in the above-entitled matter, for the allowance of an appeal to the Supreme Court of the United States from the Supreme Court of the State of Wisconsin and the Assignments of Error filed therewith and the record in said cause having been considered;

It Is Ordered that an appeal be and is hereby allowed to the Supreme Court of the United States from the Supreme Court of Wisconsin as prayed in said petition and that the clerk of the Supreme Court of the State of Wisconsin shall prepare and certify a transcript of the record and proceedings in the above-entitled cause and transmit the same to the Supreme Court of the United States within 40 days from the date hereof.

It Is Further Ordered that the Appellant, Minnesota Mining and Manufacturing Company, execute to Wisconsin Department of Taxation, Appellee, its bond with surety to be approved by the undersigned, in the sum of One Thousand ($1,000.00) Dollars, conditioned according to law.

Dated this 11th day of December, 1943.

Marvin B. Rosenberry, Chief Justice of the Supreme Court of the State of Wisconsin. (Seal.)

[fol. 2] SUPREME COURT OF THE UNITED STATES

[Title omitted]

Petition for Allowance of Appeal, Assignments of Error and Prayer for Reversal—Filed December 11, 1943

The above-named Minnesota Mining & Manufacturing Company, a Delaware corporation, considering itself aggrieved by the decision and final judgment of the Supreme

Court of the State of Wisconsin rendered on June 16, 1943, motion for rehearing of the decision and judgment therein having been denied on September 14, 1943 in the above-entitled cause, which said decision and judgment affirm the judgment of the Circuit Court for Dane County, Wisconsin, which in turn affirmed certain assessments for taxes made by the Wisconsin Department of Taxation, and held the law under which said assessments were made constitutional, although there was drawn in question the constitutionality of said law and assessments as applied to appellant under the Fourteenth Amendment to the Constitution of the United States of America, hereby prays that an appeal by this appellant be allowed to the Supreme Court of the United States herein to the end that said decision and judgment of the Supreme Court of Wisconsin may be there reviewed and considered and justice done this appellant, and that an order be made fixing the amount of bond required of appellant herein on such appeal.

[fol. 3] ASSIGNMENTS OF ERROR

The said appellant assigns the following errors in the record and proceedings of the Supreme Court of the State of Wisconsin:

(1) The Supreme Court of Wisconsin erred in failing to hold that Section 3, Chapter 505, Wisconsin Session Laws, 1935, as amended by Chapter 552, Wisconsin Session Laws, 1935, and as extended in operation by Chapter 309, Wisconsin Session Laws, 1937, and Chapter 198 of Wisconsin Session Laws, 1939, as applied to Minnesota Mining & Manufacturing Company and its stockholders under the existing facts was invalid as in conflict to the Fourteenth Amendment to the Constitution of the United States of America as imposing a tax beyond the taxing jurisdiction of the State of Wisconsin.

(2) The Supreme Court of Wisconsin erred in failing to hold that the assessments of taxes involved in this proceeding pursuant to the provisions of Section 3, Chapter 505, Wisconsin Session Laws, 1935, as amended by Chapter 552, Wisconsin Session Laws, 1935 and as extended in operation by Chapter 309, Wisconsin Session Laws, 1937 and Chapter 198 of Wisconsin Session Laws, 1939, against the Minnesota Mining & Manufacturing Company, a Delaware corporation, under the existing facts, constituted a

deprivation of property of Minnesota Mining & Manufacturing Company and its stockholders without due process of law and beyond the taxing power of the State of Wisconsin and therefore invalid as violative to the Fourteenth Amendment to the Constitution of the United States of America.

(3) The Supreme Court of Wisconsin erred in failing to hold (split decision of State Supreme Court three to three which by rule of Wisconsin Supreme Court affirmed the trial court's decision) that Section 3, Chapter 505, Wis. [fol. 4] consin Session Laws, 1935, (as amended by Chapter 552, Wisconsin Session Laws, 1935), and as extended in operation by Chapter 309, Wisconsin Session Laws, 1937, and Chapter 198 of Wisconsin Session Laws, 1939, so far as it purports to reach Wisconsin earnings of Minnesota Mining & Manufacturing Company without reference to the year in which they were earned, and for many years prior to the enactment of the law and from the time the corporation first operated in Wisconsin, are invalid as depriving the Minnesota Mining & Manufacturing Company and its stockholders of property without due process of law and therefore to this extent invalid as violative of the Fourteenth Amendment to the Constitution of the United States.

Prayer for Reversal

For these errors the said appellant prays that the judgment of the Supreme Court of Wisconsin be reversed and judgment ordered granting to the appellant the relief prayed for in the appeal to the Supreme Court of the State of Wisconsin to the tax assessments complained of.

John L. Connolly, Post Office Address: 900 Fauquier Avenue, St. Paul, Minnesota.

S. Bergen Ela, Post Office Address: 1 West Main Street, Madison 3, Wisconsin, (Attorneys for Appellant.)

[fol. 5-83] [File endorsement omitted.]

[fol. 84] [File endorsement omitted]

SUPREME COURT OF THE UNITED STATES

[Title omitted]

PRAECIPE INDICATING THE PORTIONS OF THE RECORD TO BE INCORPORATED INTO THE TRANSCRIPT—Filed December 27, 1943

To the Honorable Arthur A. McLeod, Clerk of Supreme Court of Wisconsin.

SIR:

You will please prepare a transcript of the record in the above-entitled matter to be submitted to the United States Supreme Court in pursuance to an appeal heretofore taken in this case and include therein the following:

That part of the transcript of testimony before the Wisconsin Board of Tax Appeals contained on Record Pages 51-107.

That part of Exhibit 1 attached to transcript of testimony appearing on Record Pages 385-415. (Omitting testimony with respect to Baeder-Adamson loss.)

Exhibit 5, being second revised computation of taxes for 1935-1936.

Exhibit 9, being second revised computation of Taxes on dividends for 1937.

Exhibit 13, second revised computation for taxes on dividends for 1938-1940.

Exhibit 14, partial stipulation of facts.

Decision and Order of Wisconsin Board of Tax Appeals (Record 21-26).

Notice of Appeal from Wisconsin Board of Tax Appeals to Circuit Court for Dane County. (Omitting decision and order of Board of Tax Appeals attached.)

[fol. 85] Decision of Circuit Court of Dane County (Record 499-500).

Judgment of Circuit Court for Dane County (Record 504-506).

Notice of Appeal to Supreme Court of State of Wisconsin. (Omitting exhibits attached because pertinent exhibits already included.)

Excerpts from appellant's brief in Supreme Court of Wisconsin, being question 1 of issues involved on appeal at Page 2 of brief, Heading I at page 14 of Brief, and Heading IV at Page 50 of brief.

Decision and Judgment of Supreme Court of the State of Wisconsin.

Motion for rehearing on Decision and Judgment of Supreme Court of State of Wisconsin.

Decision and Judgment on rehearing in Supreme Court of the State of Wisconsin.

Petition for Appeal to United States Supreme Court, Assignments of Error, and Prayer for Reversal.

Order Allowing Appeal and Fixing Bond.

Bond on Appeal and Order Approving Bond.

Statement as to Jurisdiction on appeal to United States Supreme Court.

Citation on Appeal to United States Supreme Court.

Service of Appeal Papers and Statement directing appellee's attention to Rule 12.

Affidavit of Service of appeal papers and Citation.

This Praecipe.

Dated this 17th day of December, 1943.

John L. Connolly, G. Burgess Ela, Attorneys for Appellant.

Personal service of the above praecipe admitted this 17th day of December, 1943.

John E. Martin, Attorney General of Wisconsin, by Harold H. Persons, Assistant Attorney General, Attorney for Appellee.

[fol. 86] [Caption omitted]

[fol. 87] In Circuit Court of Dane County

Minnesota Mining and Manufacturing Company, a Foreign Corporation, Appellant,

vs.

Wisconsin Department of Taxation, Respondent

Notice of Appeal

You Will Please Take Notice that Minnesota Mining and Manufacturing Company, a foreign corporation, appellant

in this proceeding, hereby appeals to the Supreme Court of the State of Wisconsin from the order and judgment rendered and entered in this proceeding in the Circuit Court for Dane County, Wisconsin on the 2nd day of September, 1942 in favor of the respondent and against the appellant, confirming an order and decision of the Wisconsin Board of Tax Appeals dated February 13, 1942 and an assessment and tax referred to therein, and from the whole of said order and from the whole of said judgment.

A copy of said order and judgment appealed from is hereto annexed.

Dated, September 22, 1942.

Ela, Christianson & Ela and John L. Connolly, Attorneys for Appellant.

To: John E. Martin, Esq., Attorney General of State of Wisconsin. Harold H. Persons, Esq., Asst. Attorney General of State of Wisconsin. Clerk of Circuit Court for Dane County, Wis.

[fol. 88] Before Board of Tax Appeals of Wisconsin

Portions of Transcript of Testimony

Herbert D. Kuentz, a witness in behalf of the respondent, having been first duly sworn, testified as follows:

Mr. Teschner:

Q. Will you please state your full name for the record, Mr. Kuentz?

A. Herbert D. Kuentz.

Q. And are you a graduate of the University of Wisconsin?

A. I am.

Q. What degree do you hold?

A. B. A.

Q. What course did you pursue?

A. The commercial course.

Q. And what did you major in?

A. I majored in accounting.

Q. And what is your position with the department of taxation?

A. I am chief accountant with the income tax division of the department.

Q. And are you a certified public accountant?

A. I am.

Q. And how long have you been a certified public accountant?

A. Approximately twelve years.

[fol. 89] Q. And how long have you been with the department of taxation or its predecessor, the tax commission?

A. Approximately twenty-four years.

Q. And are you familiar with the administration of the privilege dividend tax law?

A. I am.

Q. And have you been familiar with it since its passage in 1935?

A. I have.

Q. And have you been concerned with its administration constantly during that period?

A. Yes, I have.

Q. And approximately how many corporations are there which are organized under the laws of states other than Wisconsin that report their income for taxation in Wisconsin?

Mr. Ela: We object to the materiality of that question.

Mr. Teschner: It goes to his qualifications, to show his experience.

Mr. Ela: If it is based on that, I withdraw my objection.

A. There are approximately 1900 corporations organized in other states that report their income for taxation in Wisconsin.

Q. Mr. Kuentz, are you familiar with the privilege dividend tax matters involving the petitioner corporation here, the Minnesota Mining and Manufacturing Company?

A. I am.

Q. And did you supervise and direct a recomputation of that company's privilege dividend tax liability after the Wisconsin supreme court had filed its decision in the J. C. Penney and related cases?

A. I did.

[fol. 90] Q. And did you start that immediately upon receipt of the record in the Minnesota Mining Company case upon receipt from the circuit court of Dane County?

A. I did.

Q. And was the computation of the privilege dividend tax liability of the petitioner involving dividends paid dur-

ing the period 1935 and 1936 based upon the statutory presumption that dividends are paid out of earnings of the previous year?

A. The original computation which is involved in the record which went before the supreme court was based upon that assumption.

Q. That is the one I am speaking of. In recomputing the tax liability after the remand from the supreme court, what basis did you use?

A. The basis used then was the analysis of the surplus account to determine what portion thereof was represented by accumulated earnings in Wisconsin to the total accumulated earnings.

Q. And did you treat a dividend as having been paid out of the surplus of the corporation at the close of the year preceding the payment of the dividend?

A. Yes.

Q. And why did you do it that way?

A. That is my understanding of what the supreme court directed us to do, and it was taken from the surplus of the corporation as of the close of the preceding year, because we have no other time during the year on which we have a surplus balance.

Q. Now, did the methods you pursued necessitate an analysis of the petitioner's surplus account from the date it started doing business in the state of Wisconsin?

A. Yes; it did.

[fol. 91] Q. What was the privilege dividend tax liability for the years 1935 and 1936 as originally made before the case went to the supreme court?

Mr. Ela: I object to that as being wholly immaterial, what happened before; the amount of computation has nothing to do with the present computation.

Mr. Slater: That would appear from the present exhibits any way?

Mr. Ela: It appears from the present exhibits; furthermore, it is admitted that was computed on the wrong basis.

Mr. Conway: That can do no harm.

Mr. Teschner: It will prove helpful in understanding a subsequent explanation and it is really leading up to it. It is repeated here for the convenience of the board and the courts.

Mr. Conway: We will receive it subject to the objection.

A. The additional tax exclusive of interest as shown by Exhibit 1, I believe this is, and as per the assessment notice dated January 4th, 1939, is $5471.06. That is exclusive of penalty and interest.

Q. Now, Mr. Kuentz, what is the privilege dividend tax liability presently claimed by the respondent, by using the surplus analysis method, for those same years, and I refer you to Exhibit 5?

A. The privilege dividend tax liability for the same period per Exhibit 5 exclusive of interest and penalty is $2220.66.

Q. Now, Mr. Kuentz, you have heard this morning that three cases were consolidated on motion of the respondent, and is the liability in each case based upon the same analysis and method used in the case remanded from the supreme court?

A. Yes. Exhibit 9 and Exhibit 13 are merely a continuation of the analysis reflected in Exhibit 5.

[fol. 92] Q. Now, Mr. Kuentz, as a certified public accountant, will you give us a standard and commonly accepted definition of corporate surplus?

Mr. Ela: Your Honor, I object to that as calling for a conclusion of the witness. That isn't even in the field of expert testimony, because after all we are dealing with the standard which attempts to impose some sort of a tax.

Mr. Teschner: This witness has been qualified as an expert and he is asked to express that which is within his knowledge.

Mr. Slater: I assume we may or may not follow his conclusions, and we can at least have the benefit of them.

Mr. Ela: I merely want our objection noted.

The Witness: The surplus of a corporation is ordinarily defined as the excess of the net assets of the corporation over its capital stock, its outstanding capital stock.

Q. Now, did you consult any recognized accounting authorities to check on your definition?

A. I did.

Q. And what authorities did you consult?

A. I consulted Accountant's Handbook written and published by Robert H. Montgomery; one by W. A. Paton, Professor of accounting at the University of Michigan, and E. A. Saliers, professor of accounting at the Northwestern University.

Q. Mr. Kuentz, how is the surplus account of a corporation built up? By that I mean, what credits are made to a surplus account?

Mr. Ela: You mean of a corporation generally now or of this corporation?

Mr. Teschner: I am speaking of a corporation generally. I am asking him as an expert.

A. The ordinary credits to the surplus account are the net profits or net earnings of a corporation. There may be [fol. 93] credits resulting from the sale of its capital stock in excess of face value or par value thereof. There may be surplus created by the donation by the stockholders. Sometimes surplus arises through the profit on the sale of capital assets but ordinarily that goes through the profit and loss account. You may have surplus arising as a result of a re-valuation of capital assets.

Q. Mr. Kuentz, how is a surplus account generally depleted? By that I mean, what charges are made against it?

A. The ordinary charges to the surplus account are the dividends paid by the corporation, the net losses incurred by the corporation for the year or years. The loss from the sale of capital stock at less than its face or par value, and you may also have charges to surplus resulting from a revaluation of capital assets due to appraisals.

Q. Now, Mr. Kuentz, is it possible that a corporation—and I am not speaking of any particular corporation—that its surplus may be entirely tied up in fixed assets used in the corporate business, such as land, buildings or machinery?

A. That is possible.

Q. If you assume that a corporation's surplus is so tied up in fixed assets, would that be reflected upon the corporation's balance sheet?

A. Yes, if the balance sheet were properly prepared, that fact would be reflected in the balance sheet.

Q. And would you give us an example of how that would be reflected?

A. You might have a balance sheet showing land of $25,000, buildings of $25,000, and machinery of $50,000, making a total balance sheet footings of $100,000, and on the credit side you might have the capital stock of $50,000 and surplus of $50,000.

[fol. 94] Q. Now, assuming such statement of facts existed, could such a corporation declare and pay a dividend?

Mr. Ela: Again I take it you are talking generally because we have the laws of 48 states with the statutes different in each state, and I submit this witness isn't qualified to give an answer generally applicable to all corporations.

Mr. Slater: I don't know what good the answer would do, as far as our record is concerned unless we had it tied up with some specific statement.

Mr. Teschner: I have suggested an assumed statement of facts.

Q. Mr. Kuentz, in addition to the facts I have assumed, will you assume this corporation did business in the state of Delaware, and answer the question.

A. You mean, organized under the——

Q. Under the laws of the state of Delaware is what I meant to say, yes.

A. Well, from my knowledge of the law of the state of Delaware, it could pay a dividend.

Mr. Ela: Well now, I just want the record to show we are objecting to testimony by this witness of what the laws of Delaware are.

Mr. Teschner: The laws of Delaware have been stipulated in this record.

Mr. Ela: There is no question about that.

Mr. Teschner: Is there a question that the witness knows what the law of Delaware is? I can establish that, that he knows that, if that is your objection.

Mr. Ela: I don't think Mr. Kuentz claims to be qualified as passing on the effect of the Delaware corporation laws. It seems to me that is a function for this board to determine. I want the record to show that objection to that line of questioning.

[fol. 95] Mr. Slater: We will have to do that that way, whether Mr. Kuentz answers the question.

Mr. Teschner: Yes, I know that, but I believe I have the right to have it in the record.

Mr. Ela: I take it, the record shows our objection, and that it is admitted subject to that objection. Is that correct?

Mr. Conway: Yes.

The Witness: From an accounting standpoint that corporation could pay a dividend even though its entire surplus was represented on its balance sheet by the fixed assets, but it would necessitate the borrowing of cash at the bank in order to pay the dividend in cash.

Q. Mr. Kuentz, will you differentiate between the surplus account of the ordinary corporation and its surplus funds?

Mr. Ela: I take it all this testimony from now on will be admitted subject to our objection. Am I correct in that, your Honor, as to the materiality or relevancy or competency?

Mr. Conway: That is all right, you have entered your objection and we have ruled.

Mr. Ela: Yes, I appreciate that. There are further questions.

Mr. Slater: It will be a continuing objection.

Mr. Ela: That is correct.

The Witness: Will you repeat the question?

(Question read by the reporter).

A. Surplus funds in accounting terminology usually refers to cash on hand which is not at the time necessary in the operation of the business, whereas the surplus of a corporation or the surplus account as I defined it before, is the excess of the net assets of a corporation over its capital stock.

Q. Are the two terms synonymous?

A. They are not.

[fol. 96] Q. Now, Mr. Kuentz, you have already testified that you supervised an analysis of the surplus of the Minnesota Mining Company and the recomputation of its privilege dividend tax liability. What period did this analysis cover? You may refer to any of the exhibits.

A. It covered the entire period from January 1, 1930 to December 31, 1939.

Q. Why did you start with 1930, Mr. Kuentz?

A. 1930 according to the records in the office of the department of taxation is the first year in which this corporation began doing business in the state of Wisconsin.

Q. Referring to the exhibit number five, will you explain for the benefit of the board where you obtained the opening figures for your analysis and the basis for those figures?

A. The basis and the opening figures are reflected on page five of Exhibit 5, and they were obtained from the printed annual reports submitted by the taxpayer corporation.

(Discussion off the record).

Mr. Connolly: It may be stipulated that we submitted to the department printed copies of our annual reports from 1929 to 1940 as I recall, which printed reports were prepared by C. P. A.'s hired by our company. Does that answer your question, Mr. Teschner?

Mr. Teschner: Yes, that is satisfactory.

Q. Mr. Kuentz, in making your analysis, determination of percentages and computation of tax, did you give recognition to every known dollar of Wisconsin earnings and every known dollar of total earnings everywhere?

A. I did.

Q. And I am calling your attention first to Exhibit 2 which was the first notice sent out to the petitioner after the case had been received from the supreme court—you are familiar with that, are you not?

[fol. 97] A. I am.

Q. And you are also familiar with the fact that the petitioner filed an application for abatement of that assessment that is now in evidence as Exhibit 3?

A. Yes, I am familiar with that.

Q. And you are also familiar with the fact that certain concessions were made as a result of that application for abatement?

A. They were in the partial denial of the application of this abatement.

Q. And that partial denial is Exhibit 4 in this record?

A. It is.

Q. And therefore Exhibit 5 reflects the tax computation giving recognition to the concessions requested in the application for abatement?

A. Yes, to certain objections in this application which are referred to in the notice of partial denial.

Q. Yes, Mr. Kuentz, thank you. One more question, Mr. Kuentz. Speaking generally now, Mr. Kuentz, and as an accountant, can surplus of a corporation be determined at any other time except the end of the corporate year?

A. It is possible, provided the corporation closes its

books at different times during the year. It would mean a complete and accurate closing at other times, involving also the taking of inventories and the determination of accrued expenses, and so forth.

Q. To your best knowledge and belief, was that done in the case of Minnesota Mining and Manufacturing Company during any of the years here under review?

A. Not from the—it was not done from the information which we have available in the department.

Q. That is, you mean that so far as you know, Minnesota Mining and Manufacturing Company only close their [fol. 98] books once a year?

A. That is my understanding, yes.

Mr. Teschner: That is all, Mr. Kuentz, thank you. You may cross-examine.

(Thereupon a short recess was taken.)

Cross-examination.

By Mr. Connolly:

Q. I think you testified that you went back and started out with surplus as shown on the books of the Minnesota Mining Company as of January 1st, 1930. Is that correct?

A. That is right.

Q. Now, the income tax department and also the privilege dividend tax department audited the reports of the Minnesota Mining Company or books of the Minnesota Mining Company from the inception of its business up to and including 1939. Is that correct?

A. I have to speak from memory. I think they audited all those years and I am not certain whether 1937 was covered or not.

Q. 1937 I think was covered by an office audit.

A. It was in the privilege dividend tax case, yes.

Q. Yes, I think that is correct. There wasn't any field audit in 1937. Now, subsequent to the supreme court mandate, Minnesota Mining and Manufacturing Company submitted to you its audit reports at the end of each year from 1929 on down to 1939. Is that correct?

A. That is correct.

Q. And from those audit reports and what audit reports you had, tax returns in the file, you prepared Exhibit 2?

A. No. Yes, originally Exhibit 2—that is correct.

[fol. 99] Q. And subsequently to mailing out Exhibit 2 we submitted some further information to you showing that there had been omitted from the surplus in some of the years, some $185,000 for real estate located in Northern Minnesota?

A. Yes, I believe that was submitted in Exhibit 3.

Q. And in this same report we submitted some information that we sold some treasury stock at a profit of some $116,000 which you had not taken into consideration in preparing Exhibit 2?

A. I don't remember the items without referring to Exhibit 3.

(Discussion off the record.)

A. (Continuing:) That was received in information submitted by you and received by the department on October 9th, 1941. It consisted of five items as I have it here, one, a reserve for unlocated stock of $132; then shares located, the red figure of $48, a gain from the sale of treasury stock of $111,649.92, and loss from the sale of treasury stock of $5462.09, and then this adjustment for Crystal Bay property of $185,000.

Q. And in your preparation of Exhibit 5 you made the corrections as in those five items?

A. That is correct.

Q. Now, in the preparation of Exhibit 5 you started with the surplus as shown on the books as of January 1st, 1930?

A. That is correct.

Q. And the result then was surplus as of January 1st, 1931?

A. Correct.

Q. Now, you have followed that procedure all the way through to 1939, so that you stopped with a surplus as of January 1st, 1940?

A. That is correct.

[fol. 100] Q. Now, we have been talking about the entire surplus, not that part that you allocated to Wisconsin. Now, in addition it is my understanding that you took the earnings in Wisconsin and you deducted those earnings from the total earnings, the first year being 1930.

A. I don't think I deducted them from the total earnings. I set them up in a separate column.

Q. You set them up in a separate column to get at what you call outside earnings?

A. Right.

Q. So we have two types of earnings in 1930, Wisconsin earnings and all other earnings?

A. Right.

Q. Then you followed that same procedure by adding to the Wisconsin earnings in the second year—well, we first say the dividends paid in 1931, you deducted a proportion of the dividends paid in 1931 from outside earnings and a proportion to Wisconsin earnings.

A. Yes, the proportion that the balance in the surplus account for Wisconsin is to the total.

Q. Take the first year here, we have a surplus as of December 31, 1930; a total surplus——

A. May I have reference to that.

Q. I will read the question and then I will give you the exhibit.

Mr. Teschner: You have your own copy, haven't you?

Mr. Connolly: No, I haven't a copy.

Mr. Teschner: I don't think Mr. Kuentz can adequately present this.

Mr. Slater: You are refefring to schedule 2, page 2. Is that correct?

Mr. Connolly: That is right, Exhibit 5.

[fol. 101] (Question read.)

Q. —of $2,333,671.98. For the purpose of the record I am reading from Exhibit 5, page 2, schedule 2. Is that right, Mr. Kuentz?

A. That is correct.

Q. Then you had Wisconsin earnings for the year 1930 of $2396.37. Is that right?

A. That is right.

Q. Then you figured the percentage of those Wisconsin earnings which you assume were in there at the end of 1930 to total surplus?

A. That is correct.

Q. And you arrived at a percentage of .1027.

A. Correct.

Q. And then the next dividend paid in 1931, still reading from the same exhibit, was $576,131.40. You apply that percentage of .1027 to that dividend and allocated it to Wisconsin, $591.69?

A. That is correct.

Q. Now, generally you follow that same procedure all the way through?

A. That is correct.

Q. In other words, to find out what percentage of the 1931 dividend was paid out of Wisconsin earnings under your theory, you used the percentage of Wisconsin surplus or your theory of Wisconsin surplus to total surplus for the—at the end of the prior year?

A. Correct.

Q. You follow that all the way through?

A. Correct.

Q. Now, in answer to Mr. Teschner's question, you told him that you did that because you felt that that was what the supreme court in its decision said you should do?

[fol. 102] A. That was my understanding, yes.

Q. That was your understanding. Now, you would be wrong in your computations if that is not what the supreme court said you should do, would you not?

A. Well, I imagine if I am wrong in my understanding, that the computation that follows that is wrong.

Q. What is your answer, yes or no?

A. I would answer yes.

Q. You would be wrong?

A. Yes.

Q. Did you from the examination of the audit reports submitted by petitioner, the audit reports made by the auditors from your department, the tax returns, examination of those tax returns—did you attempt to make any determination as to what actually was done with the earnings from Wisconsin by the Minnesota Mining Company?

A. I didn't and I don't believe that can be done.

Mr. Connolly: Will you strike the last part of the answer as not responsive.

Mr. Teschner: No, the witness has a right to give an answer and to complete that answer.

Mr. Connolly: The question was, did he, and he says he did not. That is responsive to the question. I would like the remainder of that stricken.

Mr. Teschner: He can qualify any answer.

Mr. Slater: That appears to be a yes or no answer question, Mr. Teschner and the witness went beyond that point.

Mr. Teschner: The witness doesn't have to answer yes

or no if he cannot. The witness shouldn't be denied a right in a proceeding of this sort—before a jury, yes.

Mr. Slater: You have a right to bring that situation out later.

[fol. 103] Mr. Teschner: Yes, but this is a board expert in tax affairs, and why should we go through the routine of bringing it out later instead of bringing it out now. We are interested in making a short concise record.

Mr. Slater: Of course, how quickly we finish is up to the parties more so than the board. If the petitioner's counsel insists on having that motion ruled on, we must consider the motion.

Are you waiting for a ruling now?

Mr. Teschner: Yes.

Mr. Ela: Yes.

Mr. Conway: It is impossible to state just what the effect of this answer would be, as to what weight and consideration the board should give to it. It can't do a great deal of harm if it is left in there. Proceed to answer the question.

Mr. Connolly: He has answered it, Mr. Chairman and after he answered it he went on and gave his opinion on another matter or on the same matter. That is what I would like to have stricken out.

Mr. Conway: Well, we will let the matter stand at present until we come to consider it.

Mr. Ela: Is there a ruling on this motion to strike? That is what we are waiting for.

Mr. Teschner: It has been overruled, as I understand it.

Q. In your computation, Mr. Kuentz, you assumed that you were able to trace the earnings of $2396.37 earned in Wisconsin and find it in the total surplus at the end of that year. That is your assumption, is it not, from that computation?

A. Not that I can trace it in the sense of identifying it if it is in there.

Q. Well, you assume that—you must have assumed that it is in there from this computation, but just what was your theory there?

[fol. 104] A. The theory that so much of that surplus had been earned in Wisconsin.

Q. And is still there?

A. Still there until paid out in the form of dividends or dissipated in some other way.

Q. What way would you consider it might be dissipated?

A. Might be dissipated in the form of losses.

Q. Is that the only way?

A. Or in the payment of dividends. I testified before generally as to the ways in which surplus is dissipated.

Q. I am thinking of the particular item of surplus that came from a particular source. I am not speaking of the entire surplus.

A. I think that would be dissipated in the same way as the entire surplus is dissipated.

Q. That is a proportion of it?

A. That is correct.

Q. The first dividend that is taxable, paid by the Minnesota Mining Company, as I recall from the record, was paid January 2nd, 1936.

A. Are you asking me; that is what the record shows from Exhibit 5.

Q. What is the second taxable dividend?

A. The second one as shown from the same exhibit is on April 1, 1936.

Q. Did you make any attempt to ascertain what surplus was on hand April 1, 1936, when you were making up Exhibit 5 or the computation of liability?

A. No, I used the same opening surplus balance as I did in the preceding dividend.

Q. That is the surplus as of December 31, 1935?

A. That is correct.

[fol. 105] Q. Did you cause any investigation to be made or make any yourself to ascertain whether the Minnesota Mining Company closed its books as of April 1st, 1936 or made up any estimated statements as to what its surplus was as of that day?

A. I wouldn't use estimated statements. I used the annual statements submitted by the corporation and our own annual audit reports.

Q. I don't know that that entirely answers my question but I will ask the balance of it, that you didn't answer in this way—supposing that it had closed its books as of that date, what would you have done?

A. If I had the information available it had closed its books and the information would have been submitted to

me, I would have determined any surplus balance at that time.

Q. And that the information was submitted to you by the Minnesota Mining and Manufacturing Company that it closed its books only as of December 31st, each year.

A. That is my information, yes.

Q. And it is also a fact that they stated they took no other inventories at any other period.

A. I am not familiar with that statement.

Q. Well, let's assume that is the fact, that they close their books as at the end of each year, and they only take one inventory and that is as of December 31st at the end of each year. Do you think it is possible to make up a correct surplus account at each dividend payment date?

A. No, I don't think it is possible to revise the surplus as of each dividend date by the amount of earnings up to that time without closing the books and knowing what those earnings are.

Q. And that is one reason why you didn't do that?

A. That is one reason, yes.

[fol. 106] Q. The other reason is you thought Judge Rosenberry told you that December 31st or the end of the fiscal year?

A. Yes, that is my understanding of what he said.

Q. Now, in Exhibit 9 you made a revised computation of tax, did you, due from Minnesota for the dividends paid during the year 1937?

A. That is correct.

Q. And in Exhibit 13 you made a revised recomputation of the tax due from Minnesota for the dividends paid during the years 1938, 1939, and 1940?

A. That is correct.

Q. Did you use the same method of computing the tax under 9 and 13 that you did in Exhibit 5?

A. Used the same method, in fact, a continuation of the same analysis.

Q. That is, you took the surplus not as of the date the dividend was paid but as of the previous January 1st?

A. Correct.

Q. And you took the percentage of the alleged surplus in Wisconsin and applied that to the dividends paid during each year?

A. That is correct.

Mr. Connolly: I guess that is all, Mr. Kuentz.

Mr. Teschner: That is all, Mr. Kuentz.

Subject to the right to call witnesses in rebuttal and subject to one other matter that I haven't yet become clear on, the petitioner submitted certain printed audit reports showing the status of its affairs at the close of the year—there has been considerable questioning on cross examination on closing the books at any other time. Now, if there is to be any issue made of that that you did close them at any other time, then I want to make an offer of the printed reports that you submitted.

[fol. 107] Mr. Connolly: Mr. Teschner, there is no such contention. We didn't close our books at any other time other than December 31st each year.

Mr. Teschner: I see. The respondent rests and moves for affirmance of the assessment in accordance with the second revised recomputation in each of the three cases.

Opening statement by appellant's attorney omitted.

Herbert P. Buetow, a witness in behalf of the petitioner, being first duly sworn, testified as follows:

By Mr. Connolly:

Q. Will you give your full name to the clerk or reporter rather?

A. Herbert P. Buetow.

Q. You testified before the former Wisconsin tax commission in the hearing in 1938?

A. Yes, sir.

Q. And your testimony is recorded in Exhibit 1, I think it is?

A. Yes sir.

Q. There is in the record, Mr. Buetow, your testimony as to your previous experience?

A. Yes sir.

Q. At that time I think you testified you were comptroller and assistant treasurer of the Minnesota Mining and Manufacturing Company?

A. Yes sir.

Q. What is your position at the present time?

A. Treasurer and comptroller.

Q. Treasurer and comptroller. How long have you been treasurer?

A. Since March 1939.

Q. Do you have any other position with the Mining Company, any other official position?

[fol. 108] A. Assistant secretary.

Q. Exhibit 14 contains a statement on page four of the total amount of dividends paid from and after January 2, 1936, to and including December 19, 1940. Have you got that exhibit before you and does that include all of the dividends paid by the Minnesota Mining and Manufacturing Company subsequent to the effective date of the privilege dividend tax law?

A. Yes, sir.

Q. And was the full disclosure of all dividends paid given to the Wisconsin tax department?

A. Yes, sir.

Q. When did Minnesota Mining and Manufacturing Company start operations in Wisconsin?

A. It was late in December 1929 but we weren't officially operating until about the first of January, 1930.

Q. What was the first year you derived any income?

A. The year 1930.

Q. Now, from 1930, for all of the years down to and including 1940, has there been a full disclosure to the Wisconsin tax department?

A. Yes, sir.

Q. Of the total amount of income received by Minnesota Mining?

A. Yes, sir.

Q. On Exhibit 14, on page 4 and carrying over to and including a part of page 9, there is set out in this stipulation resolutions adopted by the board of directors of the Minnesota Mining and Manufacturing Company at the time dividends were declared. Where were those meetings held, Mr. Buetow?

A. In St. Paul, Minnesota.

Q. Was there ever any directors meetings held during that period of time from December 16, 1935, to December 1940, in any other place than St. Paul?

A. No sir.

[fol. 109] Q. Again referring to Exhibit 4, page 4, or Exhibit 14, page 4, the amount of dividends paid during the period from January 2nd, 1936, to and including December

19th, 1940, were any of those dividends paid from funds in a Wisconsin bank?

A. No sir.

Q. Where were the funds, from which those dividends were paid, deposited?

A. They were taken from funds located or deposited at the First National Bank, St. Paul, Minnesota.

Q. I think that the record will show that the mechanics was for Minnesota Mining and Manufacturing Company to draw a check on the First National Bank of St. Paul?

A. Yes, sir.

Q. And turn it over to its transfer agent?

A. Yes, sir.

Q. Which transfer agent disbursed it to the stockholders of the Minnesota Mining and Manufacturing Company?

A. That is correct.

Q. Now, that is true for all of the years from 1936 to and including 1940?

A. Yes, sir.

Q. Now, there is in the record—again referring to Exhibit 1, the total number of stockholders that Minnesota Mining and Manufacturing Company had during 1935 and 1936. For subsequent years will you give us the total number of stockholders?

A. I think you have the memorandum there, Mr. Connolly.

Q. First I would like to ask you the total number of stockholders wherever located of Minnesota Mining and Manufacturing Company.

A. On January 1st, 1938, there were 2260 stockholders. On January 1, 1940, there was 2610 stockholders.

[fol. 110] Q. Owning how many shares of stock on each of those dates?

A. 961,260.

Q. Has there been any change in the number of shares outstanding from 1935 to and including 1940?

A. No sir.

Q. Will you tell us the number of stockholders located in Wisconsin in 1938, if you have that figure?

A. On January 1, 1938, there were 44 Wisconsin stockholders owning 4940 shares.

Q. Have you got it for a subsequent date?

A. On January 1, 1940, there was 48 stockholders owning 3358 shares.

Q. Have you had charge of closing the books for all of the years from 1929 down to and including 1940?

A. Yes, sir.

Q. When are the books of the company closed?

A. December 31st of each year.

Q. Are they closed at any other time?

A. No sir.

Q. Do you make quarterly closings?

A. No sir.

Q. Do you take quarterly inventories?

A. No sir.

Q. Again referring to Exhibit 14, page 4, the second dividend during the year 1936 was paid April 1st, 1936, and it amounted to $216,009.72. Were the books closed at that time?

A. No sir.

Q. Was a physical inventory taken?

A. No sir.

Q. Who prepares the federal income tax returns for the Minnesota Mining and Manufacturing Company for all of these years in question?

A. I do.

[fol. 111] Mr. Teschner: Now, just a moment. What is the materiality of anything connected with the federal income tax returns to this particular case?

Mr. Connolly: The purpose of the question is to show that it was impossible to estimate the amount of earnings for the year 1936 as of April 1936, July 1st, 1936, October 1st, 1936, December 22nd, 1936—at the dates these particular dividends were paid.

Mr. Teschner: I don't see how the federal returns can show that. He may testify to it as a fact. The federal returns wouldn't show that. They have nothing to do with that proposition.

Mr. Slater: The question was a preliminary one.

Mr. Connolly: That is what it is.

Mr. Slater: I don't think it will do any harm to have it answered, and we can see how far it is to be pursued.

Mr. Connolly: I don't know whether the question was answered or not. Was it, Mr. Reporter?

A. You asked me, and I said I did make up the federal returns.

Q. That is, you prepared the returns for all of the years from 1929 down to and including 1940?

A. Yes, sir.

Q. Can you tell us, Mr. Bentow, what the rate of federal tax in effect for the calendar year 1935 was?

A. Can I refer to these returns?

Mr. Teschner: Just a moment. There is an objection to the materiality or relevancy of that question. What material bearing can the federal rates have upon this case.

Mr. Conway: The question was, can he tell what the federal rate of tax was.

Mr. Slater: I think we should have a statement as to the purpose to be obtained.

[fol. 112] Mr. Connolly: The purpose of those questions is to show that it was impossible to ascertain the amount of the surplus available as of April 1st, 1936, July 1st, 1936, October 1st, 1936 and December 22nd, 1936. The reason being that the amount of earnings for 1936 to go in surplus could not be ascertained even though the books were closed on any of those dates. That is the purpose of that question.

Mr. Teschner: My answer to that is, what have the federal tax returns to do with such a determination?

Mr. Connolly: And my answer to that is, you cannot pay a dividend out of the amount that you owe to Uncle Sam. It is objectionable upon the theory that the witness for the state testified to—his theory was that it was December 31, 1935, and December 31 subsequent was the date he was to take for determining the amount of surplus available. We do not subscribe to that theory. Now, if that theory is incorrect and what Judge Rosenberry was talking about is, you should find the surplus from all sources as of April 1st, 1936. I am trying to show you can't do it.

Mr. Slater: I think you have explained the primary purpose. It is to support your theory of the case, and I think only as to that purpose it would be admissible.

Mr. Connolly: That is the only purpose for which it is offered, your Honor.

Mr. Slater: You may proceed along those lines.

Mr. Connolly:

Q. The question I think Mr. Buetow, is—what were the federal rates in effect for the calendar year 1935?—

A. 13¾ per cent normal tax.

Q. That is 13¾ per cent of the net income?

A. That is right.

[fol. 113] Q. That would be all of Minnesota Mining and Manufacturing Company income from all sources?

A. Yes, sir.

Q. How do you file reports to the federal government, income tax reports, on a calendar year basis or fiscal?

A. Calendar basis.

Q. Ending December 31?

A. That is right.

Q. Was there any other federal tax in effect in 1935?

A. There was a five per cent excise profits tax based on a declared value set up prior to that time.

Q. What were the rates in effect on April 1st, 1936, at the time the first dividend was paid?

A. They were approximately the same.

Q. There has been no change in the federal law up to that time?

A. That is right.

Q. Was there any change made in the federal law in 1936?

A. Yes, in June 1936, the law was changed.

Q. Will you give us the rates for 1936?

A. The normal tax was increased as follows—do you want this in detail? Eight per cent on the first two thousand; 11 per cent on the next thirteen thousand; 13 per cent on the next 25 thousand and 15 per cent on the balance. In addition to that there was levied a surtax on undistributed profits.

Q. What were the rates on that, the range?

A. The rates ranged from 7 to 27 per cent.

Mr. Teschner: I would like to now interpose now one of Mr. Ela's continuing objections to all testimony concerning federal returns, rates, reports and other federal taxes on the grounds the same are not material or relevant to this controversy, and I take it the record will show that I have made that objection to a question before and about to come. [fol. 114] Mr. Conway: The record may show that. The record must be accurate.

Mr. Connolly:

Q. Mr. Buetow, that change made in June, 1936, when did that become effective?

A. It was retroactive to January 1st, 1936, or for the calendar year 1936.

Q. Will you explain to the board how the undistributed profit tax operated?

A. Well, practically it operated to the extent that the tax was not determined until the final dividend had been declared. In other words, there was a tax levied on the undistributed part of the income for the year.

Q. Well, would the dividend tax declared on the 22nd day of December, 1936, amounting to $624,396.50, tend to increase the corporate tax or decrease it?

A. If we had paid no dividend it would have increased the corporate tax for that year.

Q. I think you stated you could not determine the amount of that undistributed tax until that time?

A. Until the final dividend was declared for the calendar year.

Q. What is the fact Mr. Buetow, as to the rates in effect for 1937. Were they the same as they were in 1936?

A. Yes, sir.

Q. What is the fact as to the federal rates in effect for 1938?

A. The revenue act of 1938 was passed May 27th, 1938 and again changed the rates.

Q. When did it become effective?

A. Retroactive to January 1, 1938.

Q. What were the rates?

A. 19 per cent tentative normal tax with a reduction for dividends paid.

[fol. 115] Q. In other words, there was part of this 1936 act on undistributed earnings carried into the 1938 act?

A. Yes sir.

Q. What is the fact as to the rates in effect for federal tax in 1939?

A. That was on the same basis as 1938.

Q. 1938. What is the fact as to the federal rates in effect for 1940?

A. Well, in 1940 we had two revenue acts. In June, 1940, the first act was passed levying a ten per cent defense tax and then in October——

Q. Well, would you explain for the purpose of the record just how that would work out?

A. Well, 10 per cent was added to the rates then in effect.

Q. In other words, this 19½ per cent became 20.9 or something like that?

A. That is right.

Q. And when was that effective?

A. That was retroactive to January 1st, 1940.

Q. What happened after that?

A. Then in October 1940, there was enacted a new revenue act of 1940 which imposed an excess profits tax, a war excess profits tax with rates from 20 to 50 per cent and in addition raising the normal rates.

Q. Is this a correct statement of how that would operate, that everything over and above the first half million was taxed at $204,000?

A. Yes sir.

Q. And the balance over that 50 per cent?

A. Yes sir. Then that again was changed in March, 1941, which was still retroactive to January 1st, 1940; in fact, our published reports were incorrect to that extent.

Q. In what way?

[fol. 116] A. The credit for excess profits was changed on March 8th for the calendar year 1940; March 8th, 1941 they were changed.

Q. And that was retroactive back to January 1st?

A. The calendar year 1940.

Q. You say the audit report—published report is incorrect?

A. Yes sir, the published report was sent to the stockholders before the amendment to the law became known.

Mr. Teschner: Mr. Connolly, we don't concern ourselves with 1941.

Mr. Connolly: It is effective for 1940 though, Mr. Teschner.

Mr. Teschner: You are going to stop though, after——

Mr. Connolly: We are not going beyond this. We are not going into the revenue act of 1941, which was passed here recently.

Q. Approximately how much is that tax reserve overstated in that report?

A. $428,000.

Q. When did you know the exact surplus as of December 31, 1940?

A. On March 8th, 1941.

Q. After the passage of this act?

A. Right.

Q. In other words, you closed the books and that changed it by 418 thousand?

A. 428 thousand.

Q. 428 thousand. Was it over or under?

A. Our reserve was overstated.

Q. By the 428 thousand?

A. Yes sir.

Q. But when thrown back would increase surplus as of that date?

A. Yes sir.

[fol. 117] Mr. Connolly: We make no point that this hasn't been picked up and properly treated by the department in its computations. We just bring it out to show it is impossible to tell at any dividend date what the true surplus was.

Mr. Conway: Couldn't it be ascertained?

Mr. Connolly: No, your Honor. When congress did come along in 1941——

Mr. Conway: I don't care what they are going to do.

Mr. Connolly: And what they are going to do is of vital effect on how much cash we are going to have to pay these stockholders.

(Paper is marked Exhibit 15, AJK.)

Q. Were your dividends paid during any of the years 1936 to 1940 inclusive out of any special dividend account, Mr. Buetow?

A. No sir.

Q. You don't have any such thing as a dividend account?

A. No sir.

Q. It came out of the general deposits of the corporation, didn't it?

A. Yes sir.

Q. Out of the same account, I take it, as you pay all the other expenses?

A. Yes sir.

Q. Do you attempt in any way to earmark any of the earnings coming from Wisconsin or from any other state?

A. No sir.

Q. I think the record will show it, but I might ask you—did Minnesota do business in any other state than Minnesota and Wisconsin?

A. Oh yes, quite a number.

Q. In fact, it does business in all 48 states, doesn't it?

A. It does but not qualified to do business in every state.

[fol. 118] Q. In this fund from which the dividends were paid, was there any gains from the sale of any capital assets?

A. Yes.

Q. In other words, all types of gains were in this same fund, is that right?

A. Yes sir.

Q. Had Minnesota Mining and Manufacturing deducted any portion of this tax from the stockholders?

A. No sir.

Q. Has it paid the tax or any part of it?

A. Well, it hasn't paid it to the state officially. It set it up.

Q. Deposited it?

A. Deposited it with the state.

Q. Have you with you, Mr. Buetow, the original records or some of the original records of the list of stockholders for any particular date?

A. Yes.

Mr. Connolly: I won't offer that in evidence because those are our original records but I would like to ask Mr. Buetow some questions and he might testify from it.

Q. From an examination of that record, have we any stockholders that have a small number of shares?

A. Yes sir.

Q. Will you refer to the particular number there?

A. Well, on the first page there are two stockholders who have three shares each. On the second page—on the third page one stockholder has two shares.

Q. And are there many of those stockholders generally?

A. Yes sir.

[fol. 119] Q. Did you ever attempt, Mr. Buetow, to compute the amount of tax that you would deduct from that stockholder that had two shares?

A. I tried to but wasn't very successful.

Q. On the basis of the proposed assessment?

A. Because it can't be done.

Q. Why can't it be done?

A. It can't be done correctly because in the case of a small stockholder the amount to be deducted might be less than one cent. It would be a fractional part of a cent.

Mr. Teschner: I would like to interpose an objection to the question and answer, and move that the same be stricken for the reason that the computation of the amount that might or should be deducted from the stockholder's dividend is entirely immaterial when there is testimony that there never was a deduction and no claim being made by the state here that there should be such a deduction. Therefore, that becomes entirely immaterial.

Mr. Connolly: The law specifically authorizes the taxpayer or I mean it authorizes the payor corporation to deduct it and there is no claim made here that if and when this is finally adjudicated against this company, that it won't be deducted from that stockholder that has two shares. Or that it won't be deducted in the future if this tax continues and is sustained.

Mr. Slater: As we understand, in the process of the evidence it is practically in line with your offer of the federal revenue evidence; it tends to bring out your theory of the case as stated in the petition, and so that we do not interfere with the right on your part to emphasize all of your points. That would be the only purpose of the evidence, as otherwise pointed out Mr. Teschner's objection would be valid except we do not want to restrict the petitioner here [fol. 120] in advancing what testimony it wants to offer.

Mr. Teschner: I think that is a fair statement, and I will just make the objection again and continue that.

Mr. Connolly: It is in line with the allegations on page seven of this last petition, your Honor.

Q. Who did actually make the physical deduction, Minnesota Mining Company or the trust company?

A. The First Trust Company who is our registrant and transfer agent.

Q. Well, do they make the charges on the basis of certain transactions with each stockholder?

A. Yes sir.

Q. So that if it was deducted it would increase the cost of the company?

A. Yes sir, very materially.

Q. Who maintains the stock records of the Minnesota Mining and Manufacturing Company?

A. First Trust Company of St. Paul.

Q. And they are all maintained in St. Paul?

A. Yes sir.

Q. Not maintained in Wisconsin?

A. No sir. There is a duplicate set kept by the Corporation Trust Company in Delaware.

Q. To comply with the Delaware laws?

A. Yes sir.

Mr. Conway: Is that the only one outside of Minnesota—Delaware?

A. Yes sir.

Q. Have you got with you there the copy of your audit report for any year?

A. My own audits.

Q. Yes, or the ones made up by the tax department or the ones made up by the certified public accountants?

[fol. 121] A. I don't have the one made up by the C. P. A. I think you have it, Mr. Teschner.

Mr. Teschner: Yes, I have got it. Right here they are.

Q. I will ask you if the amount of surplus at the end of 1935, 1936, 1937, 1938 and 1939 is all invested in tangible assets?

A. No sir.

Q. Generally, what is it invested in——

A. Well, there is accounts, inventories, fixed assets, such as land, buildings, machinery, equipment.

Q. Have you any stock of partially own- subsidiaries?

A. Yes, we do.

Q. And I assume there is cash in addition to those others?

A. Yes.

Q. During any of those years did the cash amount to the equal of your surplus?

A. No sir.

Q. Did Minnesota Mining and Manufacturing Company during the period from 1929 to 1940 inclusive borrow any money to pay dividends?

A. No sir.

Q. Since 1930 down to and including December 31, 1940, did the Minnesota Mining and Manufacturing Company borrow any money for the purpose of expansion?

A. Will you explain?

Q. From 1931 to 1940?

A. We did not borrow any money since 1931.

Q. In 1931 there was some money borrowed to acquire some fixed assets?

A. In 1930.

Q. 1930. What is the fact as to books and records of the company. Do we keep a separate set of books for Wausau?

A. No, but we do have special accounts on all of our books so that the accounts can be segregated from all other [fol. 122] accounts for all other operations throughout the company.

Q. How about the question of physical assets used in operating Wausau. Can you tell from your books and records what those were on any particular date?

A. Yes sir.

Q. I will ask you as of the end of each year.

A. Yes sir.

Q. Have you those records with you?

A. Yes sir.

Q. I will show you Exhibit 15 and I will ask you what that is, Mr. Buetow?

A. That is a statement of net assets and net earnings and advances from St. Paul to operate the Wausau division.

Q. Who prepared it?

A. I did.

Q. From what source did you get your information?

A. From the general books of the company.

Q. And those books are kept by you?

A. Yes sir.

Q. Or under your direction?

A. Under my direction.

Q. Are the books true and correct?

A. Yes sir.

Q. Does that statement reflect all of the assets used in operating the business in Wisconsin as of December 31 of each one of those years?

A. Yes sir.

Q. Is that statement true and correct?

A. Yes sir.

Q. Did Minnesota Mining and Manufacturing Company ever have any earnings out of the state of Wisconsin

for the purpose of paying dividends—available for the purpose of paying dividends?

[fol. 123] A. Outside the state of Wisconsin?

Q. No, from the state of Wisconsin?

Mr. Teschner: That question is objected to as calling for a legal conclusion of the witness. There is testimony here that the earnings are not segregated, not ear-marked in any way.

Mr. Connolly: I will withdraw that question at this time and I will offer Exhibit 15 in evidence.

Mr. Teschner: We want to reserve our objection to Exhibit 15. We have seen something that was supposed to be like this but this looks a little different, Mr. Ela.

Mr. Ela: It is substantially the same. Mr. Buetow will testify he has made slight changes in this to correspond with the actual facts. The exhibit, Mr. Teschner, is substantially the same as the one we submitted to you in the hope we could stipulate on the figures, but Mr. Buetow will explain that difference.

Q. I will ask you, Mr. Buetow, what difference there is in the figures in Exhibit 15 and the ones previously submitted to the department.

A. Well, there was typographical error on the other exhibit and this one is changed to the extent that factory supply inventories were added to the assets which changed the advances from St. Paul.

Mr. Teschner: Do you mind if I ask a question concerning this exhibit at this time?

Mr. Connolly: Not at all.

Mr. Teschner:

Q. Mr. Buetow, does Exhibit 15 purport to be a balance sheet of Minnesota Mining and Manufacturing Company?

A. I said it was a statement of net assets and advances from St. Paul. That wouldn't necessarily be construed as a balance sheet. The balance sheet would have other items on it.

[fol. 124] Q. Do you intend to have this construed here as a balance sheet?

A. Not necessarily.

Q. Well, do you?

A. Well, you will have to tell me what you mean by a balance sheet and I will tell you whether I construe it as

such. I mean we have accounting terms for balance sheets, and if you will ask me that question I will say no, this is not a balance sheet.

Q. Have you given any—have you made any allocation of capital stock to the deduction portion of this schedule?

A. No sir.

Q. You have not?

A. That is right.

Mr. Teschner: That is all, Mr. Buetow. Our objection is still being made that this is immaterial and irrelevant.

Mr. Connolly: The purpose of that offer is to show what assets we had in Wausau and what disposition was made of the income that we got out of Wausau. That is the purpose of the offer.

Mr. Slater: Mr. Teschner, you are not objecting to this because it may not be the best form of evidence? Just as to the materiality?

Mr. Teschner: Just to the materiality and to its relevancy.

Mr. Conway: What is the nature of this Wausau?

Mr. Connolly: The Wausau operations is the quarrying of quartzite and the crushing and screening it and adding—running it through a heated kiln and adding a chemical to make rough granules. That is the only operation we have in Wausau.

Mr. Ela: The only operation in Wisconsin, too.

Mr. Teschner: Did I understand you to say, Mr. Connolly, that this Exhibit 15 purports to show the disposi- [fol. 125] tion of the Wisconsin net earnings?

Mr. Connolly: We offer it for that purpose. Now, whether it does or it doesn't is a question of construction and question of argument.

Mr. Slater: We understand these items might be obtained by looking at the income tax reports for the same period of time. It is merely a summary of what might otherwise be shown on income tax reports.

Mr. Connolly: The only item that could not be obtained there is the amount of cash and the amount we label as advances from St. Paul. They wouldn't be shown on the income tax report. Everything else is on there. The nets income, the reserve, and depreciation, the buildings, income, and machinery.

Mr. Slater: Is there any serious objection in view of that?

Mr. Teschner: Yes, the objection is very seriously made. This is neither material or relevant to the issues in this case.

Mr. Slater: I assume in this situation we should accept it subject to the objection. There is a third member here who might consider it has some merit and we don't want to foreclose him of the opportunity of examining it.

Mr. Teschner: With the objection noted and accepted that way, and subject to further cross-examination in rebuttal, of course.

Mr. Slater: Did it carry any bank account in Wausau?

Mr. Connolly: Yes, your Honor. That Exhibit will show a cash bank account of December 31, 1930 of $25.16, and the last one is $13537.49. It ranges all the way from less than one hundred dollars, less than seven hundred dollars, less than five hundred, less than five thousand, less than nine thousand, less than seven thousand, less than eight, less than seven hundred, less than twelve, just slightly under 14 in 1940. It shows every item in the Wisconsin operations.

[fol. 126] Q. Now, Mr. Buetow, if you will refer to Exhibit 15, will you tell me what the assets or investment in Wausau, Wisconsin, was December 31, 1930?

A. The investment—advances from St. Paul.

Q. No, just the total assets?

A. $55,277.54.

Q. What were the earnings for that year?

A. $2396.37.

Q. Where did the difference come from?

A. The money was advanced from St. Paul.

Q. Taken out of this same account out of which it paid dividends out of?

A. Yes sir.

Q. Take the next year, 1931, give me the gross assets.

A. $60,478.63.

Q. And what were the accumulated earnings for the two years up to that time?

A. $13,924.06.

Q. Where did this difference of 40 thousand come from?

A. That was advanced from St. Paul.

Q. Taken from these same funds?

A. Yes sir.

Q. Then 1933—skip 1932.

A. Total assets were $224,618.33 and the advances—the total earnings were $23,216.07. Advances from St. Paul were $180,886.25.

Mr. Conway: By that you mean the Wausau plant?

A. That is in the Wausau plant only.

Q. Does that mean, Mr. Buetow, for that year there was advanced—that there was expended down there 224 thousand and the only amount of earnings up to that date was 23 thousand?

[fol. 127] A. Not necessarily expended because there was a cash balance but practically so. That is not the exact figures.

Q. Take the next year, 1934.

A. Total assets were $813,508.39; the net earnings were $7999.84; the advances from St. Paul amounted to $748,961.06.

Q. What reduced that earnings from $23,216.07 to $7999.84?

A. We had a loss in the Wausau operations.

Q. But notwithstanding the loss, you still put back in there something over half a million dollars in Wisconsin?

A. Yes, sir.

Q. Now, let's take the figures at the end of 1940. Will you give us those same figures?

A. Total assets are $2,137,831.03; total earnings $1,391,288.93, and the advances from St. Paul $204,485.19.

Q. That figure that you gave me for net income is the total net income from 1930 on to and including 1940?

A. That is the accumulated earnings.

Q. Only one item deducted?

A. That is it.

Q. Accrued income taxes.

A. Yes, sir.

Q. That hadn't been paid until the subsequent year?

A. That is right.

Q. In the declaration of dividends by the stockholders—board of directors, I should say—and by the way, are you a member of the board?

A. Yes, sir.

Q. Was there ever any attempt made to declare a dividend out of any particular state's earnings?

A. No, sir.

Q. What was it declared from?

[fol. 128] A. Out of the total earnings of the company.

Q. By total earnings you mean surplus?

A. Surplus earnings.

Mr. Conway: No matter where they emanated from. Is that right?

A. Yes, sir.

Q. From an examination of Exhibit 15 and your knowledge as an accountant and your experience as previously shown in this record, what would Exhibit 15 disclose at the end of 1940 as far as money put in Wisconsin was concerned?

A. You mean in dollars?

Q. In dollars.

A. $204,045.19.

Q. I mean total dollars, Mr. Buetow?

A. $2,137,831.03.

Q. Now, all of that is tied up in inventories, bricks and mortar outside of the cash?

A. Right.

Q. And for the total operations in Wisconsin you had how much earnings?

A. $1,391,288.93.

Q. Where did the balance come from?

A. Advanced from St. Paul.

Q. In other words you spent $204,000 more in Wisconsin after taking into consideration depreciation, than you actually made in Wisconsin?

A. Yes, sir.

Q. By you I mean Minnesota Mining. The income tax returns that are filed in Wisconsin, on what basis are they filed?

A. Under separate accounting basis.

Q. Are they on a fiscal or calendar year?

A. Calendar year basis.

[fol. 129] Q. And these separate records are kept for certain operations in Wisconsin?

A. Yes, sir.

Q. So that you can make up the tax return on that basis?

A. Yes, sir.

Q. It is true you have to allocate certain——

A. There are certain overhead expenses which are allocated.

Q. Mr. Buetow, I am going to ask you a question and I want you to take into consideration the resolutions adopted by the board of directors of the Minnesota Mining and Manufacturing Company from December 16th, 1935, down to and including the one adopted December, 1940, and also Exhibit 15—I am going to ask you if you have an opinion as to whether or not any dividends paid by the Minnesota Mining and Manufacturing Company during that period were paid from Wisconsin earnings. Answer that question yes or no.

A. No.

Q. I want to know if you have an opinion as to whether or not there was?

A. I have a very definite opinion.

Q. What is your opinion? I am going to ask you what your opinion is, and if Mr. Teschner wants to object, I wish you would wait a moment.

Mr. Teschner: No, I don't want to object; go ahead.

Q. What is your opinion?

A. I have an opinion there wasn't any dividends declared out of profits earned in Wisconsin.

Q. What is the basis of that opinion?

A. Because the earnings were all used to expand the business in Wisconsin. They were reinvested in fixed assets, inventories and so forth.

[fol. 130] Mr. Conway: Any revenue produced in Wisconsin, was that sent to St. Paul?

A. When you figure it that way, the money all comes to St. Paul from the customers and is accumulated there from all sources, but when we spend money in Wausau we must take it out of the bank account at St. Paul to pay for it. When we spent 550 thousand for buildings, it has to be spent from money in St. Paul.

Q. In other words, when you spent during the year 1934 $818,508.39 and had accumulated earnings up to that time of $7999.84, it is your opinion that that balance of that comes from some other source?

A. Yes, sir.

Q. And that you weren't paying any dividends out of Wisconsin earnings?

A. Yes, sir.

Mr. Conway: Whatever was made in Wisconsin by way of revenue was sent to St. Paul. You mean to be understood that way?

A. I think that is right. I mean, when I said before, the money is commingled in St. Paul, including Wisconsin operations.

Mr. Conway: And when it gets there it is lost?

A. Yes, sir. It is just lost track of. It isn't quite lost.

Mr. Slater: May I ask you this question——

A. Yes, sir.

Q. What is the exact nature of the operations in Wausau?

A. We started with in the beginning, we bought the old Wausau Abrasive Company in Wausau who were manufacturing sandpaper. Included in those assets was Rib Mountain; we tried to find a use for the certain type of rock but we couldn't use that for sandpaper. There was a need for [fol. 130-a] a colored mineral which is deposited on asphalt shingles to protect it from the sun. Up to that point it had only had the natural color, the rock, for instance slate and red rock. We artificially color every little particle of mineral and sell it to the roofing companies, and the mining, quarrying, crushing and coloring takes place at Wisconsin. Now, we have certain by-products from that which Mr. Connolly mentioned which are not very important, such as sandblast.

Q. Are your operations in Wausau entirely unrelated to your operations in the east?

A. We have a similar operation in Tobe, Ohio, but neither one of those two plants have anything in common with the plant in St. Paul or Detroit.

Q. Are the experiences gained in Wisconsin a benefit to any other operation that the Minnesota Mining Company does anywhere else in the United States?

A. No, it is an entirely different product manufactured in Wisconsin.

By Mr. Teschner:

Q. But you sell that product throughout the entire United States?

A. Oh, yes. He asked me if we were benefited by Wausau operations. You asked me if I understood it.

Q. Whether there is any relation whatsoever, in other words, the Wausau operations are not an isolated operation of the Minnesota Mining Company?

A. Oh, absolutely they are.

Q. Don't they dovetail with any other operation?

A. No.

[fol. 131] By Mr. Teschner:

Q. They dovetail with selling?

A. Sure.

Q. Assume that you do sell the products of the Wausau plant throughout the United States, that sale is handled by the Minnesota Mining Company, is it not?

A. Yes, sir.

Q. And it derives a benefit from the operations of the Wausau plant?

A. In that sense they do, yes, sir.

By Mr. Conway:

Q. This Wausau project according to your testimony is in the vicinity of Rib Mountain?

A. Yes. We take the rock off Rib Mountain.

Q. Is that the only area it covers?

A. Yes.

Mr. Connolly: We have a quarry north of Wausau.

A. Yes, that is right.

Mr. Connolly: Brokaw.

A. There is something wrong with the Rock in Rib Mountain. In other words, there is a certain transparency we can't get along with so we have to change the type and we are now operating in Brokaw.

By Mr. Connolly:

Q. Mr. Buetow, for the purpose of the record and information of the board members, you might tell what operations are carried on in St. Paul and Detroit.

A. In St. Paul we manufacture adhesive tapes and sandpaper and a varied line, such as automobile varnish, flat paints and so forth. In Detroit we make rubber cements. None of those products are made in Wisconsin.

[fol. 132] Q. Is there anything manufactured in Wisconsin that is used or has any relation to our other products?

A. Only as our Ohio plant makes the same class of material.

Q. But the operations are entirely different?

A. Yes, sir.

Mr. Connolly: You may inquire.

(Whereupon a short recess was here taken).

Mr. Connolly: Mr. Buetow, on the basis of computation of income used by the department for prior years, can you give us the net income of Minnesota Mining and Manufacturing Company from all sources for the year 1940?

A. $5,734,476.36.

Q. Now, there is in the exhibits, the state's method of computation of surplus at the end of each year. On the same basis can you give us the surplus as of December 31, 1940?

A. $15,236,387.37.

Q. That is computed on the same basis as the department used in prior years?

A. Same adjustments.

Mr. Connolly: That is all.

Cross-examination.

By Mr. Teschner:

Q. Mr. Buetow, assuming that the surplus of the Minnesota Mining Corporation is represented by the excess of its net assets over its outstanding capital stock, then answer this question: Does Minnesota Mining and Manufacturing Company have a separate surplus for Wisconsin?

A. No, sir.

[fol. 133] Q. Now, Mr. Buetow, are the surplus funds of a corporation generally speaking, the same as the balance in its surplus account?

A. No sir.

Q. And you have testified I believe several times but I want to repeat it once more to make sure I heard it correctly—are the earnings from Wisconsin property and business after they are credited to your general surplus account, earmarked in any way whatsoever?

A. No sir.

Q. Are the funds—I am speaking now of funds, derived——

A. You mean cash now?

Q. Cash funds or credits derived from the transaction of business in Wausau earmarked or kept separate from the general funds of the company?

A. If you are speaking of cash, they are not separately earmarked.

Q. You stated as a fact that in 1930 you acquired some physical assets in Wisconsin, did you not?

A. Yes sir.

Q. Was that purchase of physical assets charged to the surplus of Minnesota Mining?

A. Well, why don't you tell them how to answer the question. I don't think that is a statement that an accountant can answer.

Q. How is that transaction set up on the Minnesota Mining and Manufacturing Company?

A. The assets used by the—the physical assets of the Wausau Abrasive Company were set up on our books as physical assets or whatever assets there were.

[fol. 134] Q. Did it deplete the surplus account in any way?

A. Of what?

Q. Of Minnesota Mining and Manufacturing Company?

A. No sir.

Mr. Teschner: Now, I would like to have marked as Exhibit 16 the printed annual reports of the Minnesota Mining and Manufacturing Company for the years beginning with December 1, 1929, through and including the year 1940.

(Annual reports marked Exhibit 16, AJK).

Q. Now, Mr. Buetow, this is a copy of the annual reports of Minnesota Mining and Manufacturing Company as put out in printed form, is it not?

A. Yes sir.

Q. Taking at random the condensed balance sheet of December 31, 1935, I see that you have surplus unappropriated in the amount of $3,291,492.35. Are Wisconsin earnings reflected or included in that figure?

A. Yes sir.

Q. And that would be true of any other balance sheet that I would pick out of this volume, would it not?

A. Except some—yes sir.

Mr. Teschner: I offer in evidence Exhibit 16.

Mr. Connolly: I would like to know the purpose of it, Mr. Teschner.

Mr. Teschner: There has been a lot of reference in the trial to those printed reports. If for no other reason than those various references, and the fact that those figures were taken from your books, that alone should entitle that document to be in this record as an Exhibit. Under our theory of the case, the second reason now why that should be in evidence, we of course say that there being no segregation of Wisconsin earnings, it does become material to know [fol. 135] that the surplus figure used by the petitioner corporation contains Wisconsin income as testified.

Mr. Connolly: He has testified to that, he will admit that; I will admit it.

Mr. Teschner: I think it is corroborative and primarily because so much reference has been made to those printed reports.

Mr. Conway: The same is received.

Q. Mr. Buetow, one more question. Have you or has anyone charged with that responsibility prepared a computation of the privilege dividend tax liability of Minnesota Mining and Manufacturing Company according to its interpretation of the Wisconsin supreme court mandate?

Mr. Connolly: I object to that, being incompetent, irrelevant and immaterial. The duty is not on the taxpayer to prepare any computation. It is our position here that we show in all the testimony that no dividends were paid out of Wisconsin earnings.

Mr. Conway: The question may be answered.

A. We have made no computation.

[fols. 136-138] EXHIBIT No. 1

That Part of Exhibit 1 Attached to Transcript of Testimony Appearing on Record Pages of State Supreme Court 385-415

BEFORE THE WISCONSIN TAX COMMISSION

In the Matter of the Appeal of MINNESOTA MINING & MANUFACTURING COMPANY, from an Assessment of Privilege Dividend Taxes With Respect to Dividends Paid January 2, 1936, April 1, 1936, July 1, 1936, October 1, 1936 and December 22, 1936

This matter came on for hearing before the Commission on April 14th, 1938, at 10 A. M.

Before Commissioners Wm. J. Conway, Chairman; Herbert L. Mount, Henry A. Gunderson.

APPEARANCES:

For the Income Tax Division, of the Tax Commission, John S. Best, Esq., Income Tax Counsel.

For the Taxpayer, Frederick J. Miller, Esq., of Little Falls, Minn., and John L. Connolly, of St. Paul, Minn.

. . . . . .

[fol. 139] HERBERT B. BUETOW, a witness produced in behalf of the Taxpayer, having been first duly sworn, was examined and testified as follows, to-wit:

Direct examination.

By Mr. Miller:

Q. Will you please state your name and residence and occupation?

A. Herbert B. Buetow. Residence, St. Paul, Minn., present occupation is assistant secretary and treasurer, comptroller of the Minnesota Mining and Manufacturing Company.

Q. How long have you held that position? How long have you been with the Minnesota Mining?

A. Since 1926.

Q. And will you state what positions you held with them?

A. After leaving school I was employed as cost accountant with Waldorf Paper Products. About 1916 I resigned that position and took a position with the Athletic Club, St. Paul Athletic Club, where I installed the system and supervised the accounting. Later I became associated with the Bishop Brissman Company, St. Paul, public accountants, as a staff auditor; later I was employed by the City of St. Paul to install an accounting system in the Department of Public Works. Later I again became associated with the firm of public accountants by the name of McGregor and Hines as Staff auditor. Later I was in charge of the accounting at the Elks Club. Later I was employed by the State of Minnesota in the Department of Agriculture to make audits of various creameries in the Department of Agriculture. I resigned there to become associated with the Minnesota Mining Company first as auditor and later promoted to these various positions and all this time I have done tax work, in other words for a period of about 20 years, mostly federal work and some state work in the [fol. 140] interim at various times.

Commissioner Gunderson: What time did you go to the Minnesota Manufacturing?

A. 1926, February 1926.

Q. Will you please state your duties at the present time as an officer of the Minnesota Mining Company?

A. Well, I have direct control over the entire accounting cost and statistical department and financial records and indirect supervision over the entire office consisting of about 225 people.

Q. Are all the books and records and accounts of the Minnesota Mining Company kept under your supervision?

A. Yes sir.

Q. Do you hold any other positions in the auditing world?

A. Well, I am a member of the Comptrollers Institute of America, and at the present time I am the president of the Twin Cities Chapter or Control—Twin City Control, that is the name of the chapter. This institute permits membership of comptrollers of companies whose assets exceed about a million dollars throughout the United States.

Q. Mr. Buetow, have you had compiled a statement as to the number of stockholders of the Minnesota Mining Com-

pany, the outstanding shares and number of stockholders in Wisconsin and the shares that they hold?

A. Well, I have prepared under my supervision a list showing those numbers, and if I may be permitted to refer to some figures here—I couldn't remember them all.

Q. Will you please state what those figures were as to the number of stockholders, the number of shares that were outstanding on January 1st, 1936.

A. 1961.

Q. How many shares did they own?

A. 961,260.

[fol. 141] Q. How many stockholders resided in the State of Wisconsin?

A. 42.

Q. How many shares of stock did they own?

A. 3006.

Q. Have you computed the number of stockholders who since January 1st, 1936, have sold their stock?

A. There is 347.

Q. And how many shares of stock did they own?

A. 138,747.

Q. And can you tell me the number of stockholders in Wisconsin who sold their stocks since January 1st, 1936?

A. 20.

Q. And how many shares of stock did they own?

A. 1377.

Q. Do you know the number of shares of stockholders in Wisconsin on January 1st, 1938?

A. 44.

Q. And how many shares of stock did they own?

A. 4944.

Q. Where does Minnesota Mining Company operate a factory in the state of Wisconsin?

A. At Wausau, Wisconsin.

Q. And what do you manufacture there?

A. Roofing granule, that is the name used by the roofing trade and is the so called granule which is placed on top of the asphalt to preserve the asphalt on a composition roof.

Q. And where does the factory ship its products?

A. The Wausau plant ships to Chicago and points west and west of Chicago.

Q. And by whom are the sales from the Wausau plant handled and where does he reside?

A. Mr. Voss is the sales manager in charge of the colored [fol. 142] quartz which is the trade name of the product. He contacts the various roofing companies and gets the orders for their requirements for a period of about six months in advance. He sends those orders to St. Paul and shipping instructions from the roofing companies are sent to St. Paul where decision is made as to when the shipment shall be made. He resides in the City of Chicago and has an office in our Chicago branch.

Q. After the shipments are made how is the customer billed? How does he pay the account and where and how is the receipt of the money handled or the money handled when received?

A. The Wausau plant prepared a shipping ticket on which are shown the tonnages shipped. This ticket is sent to St. Paul where it is priced and extended and a bill sent to the customer. The customer remits directly to St. Paul and these funds are commingled with funds of other factories and other divisions of our business and are deposited in the St. Paul bank. These funds may be used to pay all bills and royalties and dividends.

Q. How are the wages to the employes of the Minnesota Mining Company at Wausau paid?

A. The pay roll cards so-called time cards, are prepared at the Wausau plant and sent to St. Paul, who make the extensions and checks are drawn, signed by an officer at St. Paul and then sent to the Wausau plant manager for distribution. The checks are drawn on a Wausau bank. A deposit is made on the same day in equal amount of the total of the pay roll at that bank in Wisconsin.

Q. Where does the Minnesota Mining Company operate factories outside of the factory at Wausau, Wisconsin?

A. At Detroit, Michigan, and Copley, Ohio. Copley is a suburb of Akron.

Q. And St. Paul?

A. And St. Paul.

[fol. 143] (Testimony at record pages 392-394 concerns Baeder Adamson loss and is omitted.)

Q. Did the Minnesota Mining Company receive in the year 1935 any interest from Federal securities?

A. Yes.

Q. Can you tell us the amount of it?

A. In the year 1935 they received $10,191.37.

Q. Did they receive any interest from Federal securities in the year 1936?

A. Yes, $14,331.65.

Q. Now, these Federal securities—where are those bonds or securities actually kept?

A. In a vault at the bank of St. Paul.

Q. And where are the coupons actually clipped from the bonds, and cashed?

A. They are clipped at the bank in St. Paul and deposited in the St. Paul bank for collection.

Q. No part of the interest is received, paid, or deposited in the State of Wisconsin?

A. No sir.

Q. Now, did the Minnesota Mining Company in the year 1935 receive any other interest or dividends?

A. Yes.

Mr. Best: I fail to see the materiality of that. It is conceded, Mr. Miller, isn't it, that no interest or dividends was included in Wisconsin income by the auditor?

Mr. Miller: I think that is correct.

Commissioner Gunderson: Then how is it material?

Mr. Miller: We contend it is material because it reflects the income to the State of Wisconsin; the way the auditor computed this tax we propose to show which was earned outside of Wisconsin.

[fol. 144] Commissioner Gunderson: There is no dispute as to the correctness of the Wisconsin income as determined by the auditor?

Mr. Miller: That is correct.

Mr. Best: No dispute as to the Wisconsin income.

Mr. Connolly: That is correct.

Mr. Miller: Except as far as this loss is concerned, yes.

Mr. Best: And in that Wisconsin income there is no interest or dividends or royalties?

Mr. Miller: Correct.

Commissioner Conway: I don't believe that is material in this case.

Mr. Miller: May I make an offer of proof then? I would like to prove certain facts in reference to this.

Commissioner Conway: Offer proof of what?

Mr. Miller: To prove certain facts by this witness.

Commissioner Conway: Oh certainly. The question you just asked indicates that is immaterial.

Mr. Miller: Yes, I understand it is sustained as being immaterial.

Commissioner Conway: Yes.

Exception.

Mr. Miller: Then we would like to prove by this witness during the year 1935 the Minnesota Mining Company received dividends of $328,096.23, received interest from other than Federal securities of $27,125.17, and received interest on state obligations of $173.25. And now is the Commission's ruling the same? I would like to ask Mr. Buetow this question:

Q. Mr. Buetow, in the year 1936 did the Minnesota Mining Company have interest receipts and dividend receipts other than Federal securities?

Mr. Best: The same objection.

[fol. 145] A. Yes.

Commissioner Conway: The same ruling.

Exception.

Mr. Miller: May I now offer to prove by this witness that in the year 1936 the Minnesota Mining Company received from dividends $254,834, and interest from obligations other than United States securities of $7797.53? Will the Commission kindly rule as to whether those offers are rejected and then we can go on.

Commissioner Gunderson: We have so ruled, haven't we?

Mr. Miller: You object to the offer, I suppose?

Mr. Best: As I understand, yes; you have offered—you asked the witness a question and I have objected and the objection has been sustained and your objection is preserved under the rules of practice before the Commission. Now you have made an offer of proof and I will object to that offer.

Commisioner Conway: We sustained your objection.

Mr. Miller: Don't you have to sustain it again?

Commissioner Gunderson: We can do that.

Commissioner Mount: The offer is rejected.

Mr. Best: The facts which you wanted to show are now in the record.

Mr. Miller: Yes.

Mr. Connolly: That is all.

Mr. Miller:

Q. Now, Mr. Buetow, the interest from these obligations other than Federal obligations which you have already testified to, was received by the Minnesota Mining and Manufacturing Company where?

Mr. Best: I object to that also: that should be included in your offer of proofs.

Mr. Miller: If that is the Commission's ruling. To make my position clear here, might it please the Commission, I [fol. 146] would like to show by several questions from this witness that these securities have a business situs outside of the State of Wisconsin.

Commissioner Conway: Is that in dispute?

Mr. Best: I will stipulate that there is no contention on the part of the Income Tax Division and on the part of the State that any securities or any intangibles of this taxpayer have a situs in the State of Wisconsin. That, of course, is evident from the fact that no income from such intangibles has been included in Wisconsin income by the auditor.

Commissioner Conway: Doesn't that answer your purpose?

Mr. Miller: I think that covers that.

Commissioner Mount: You stipulate that without conceding the materiality of it?

Mr. Best: Yes.

Mr. Miller:

Q. Now, Mr. Buetow, has the Minnesota Mining and Manufacturing Company in the year 1935 and in the year 1936 any income from royalties and patents owned by it?

Mr. Best: Same objection.

Commissioner Conway: What is the basis of your objection?

Mr. Best: On the ground of materiality, relevancy; goes to the same questions exactly as involved in the interest matter.

Commissioner Mount: That is the record shows that was not an element considered in ascertaining Wisconsin income.

Mr. Miller: May I show the facts and then you will stipulate the same thing to show how much they were?

Mr. Best: You make an offer of proof as to the royalties as you did for the interest.

Mr. Miller: Was the objection sustained?

Commissioner Conway: It wasn't taken into consideration.

Mr. Best: Counsel has already stated that no income [fol. 147] and no royalties was included in the Wisconsin income.

Commissioner Conway: We will have to sustain the objection.

Exception.

Mr. Miller: The Minnesota Mining Company offers to prove by this witness that in the year 1935 it received royalties from patents owned by it of $154,447.53, of which $224.20 was from earnings in Wausau, Wisconsin, leaving a balance of $154,223.33 earned by the taxpayer or received by the taxpayer from earnings outside of the State of Wisconsin.

Mr. Best: Just a minute please—off the record.

(Discussion off the record).

(Offer of proof read).

Mr. Best: Is it the taxpayer's position then, Mr. Miller, that this item of $200 of royalties were received on an intangible which had a business situs in Wisconsin?

Mr. Miller: No, we want to be absolutely accurate in these statements. Every other dollar of this 154 thousand was earned from these patents, earned from outside the State of Wisconsin. That possibly was earned in Wisconsin and possibly not. We contend the business situs is in St. Paul and we want to be fair in this statement. Is that correct?

Mr. Connolly: That is correct.

(Discussion off the record).

Mr. Best: Now, I object to the offer of proof.

Commissioner Conway: Sustain the objection.

Exception.

Mr. Miller: The taxpayer offers to prove by this witness that in the year 1936 it received earnings from royalties on patents of $153,623.35 of which $144.76 was from the royalties used in the color quartz operations at Wausau, Wisconsin, leaving a balance of $153,478.59 which was from royalties earned outside, clearly outside the State of Wisconsin.

[fol. 148] Mr. Best: The same objection.

Commissioner Conway: Objection sustained.

Exception.

(Discussion off the record).

Mr. Best: Without prejudice as to our position, as to materiality, we stipulate that these intangibles from which the royalties were derived had no business situs in Wisconsin.

Mr. Miller:

Q. Mr. Buetow, have you checked the Commission's figures as to the amount of dividends paid in the year 1936 with the actual payments?

A. Yes, I have.

Mr. Best: If the Commission please, Exhibit 3, the audit report, shows in schedule 3 a summary of the amounts of dividends paid in the year 1936, the amounts are shown with respect to the dividends paid on April, July, and October 1st, 1936, and on December 22nd, 1936, include dividends paid on treasury stock to the amount of $1866.25.

Mr. Miller: Correct.

Mr. Best: That is the total for those four dividends. The dividends shown in schedule 3 of Exhibit 3 as being paid on January 2, 1936 thereon and include an amount of $371.25 representing a dividend on treasury stock which was paid on that day.

Mr. Miller: That is correct. It is our contention we shouldn't be taxed on these treasury stock dividends.

Commissioner Conway: There is no dispute as to the facts; it is a question of law.

Mr. Best: I think, if the Commission please, you ought to go into the manner in which the dividends were paid so as to show how these treasury stock amounts were arrived at.

Mr. Miller:

Q. Mr. Buetow, how were the dividends as declared by [fol. 149] the directors actually paid?

A. The First Trust Company.

Q. First Trust Company where?

A. Of St. Paul is the——

Q. Minnesota.

A. Of St. Paul, Minnesota, is the disbursing agent for dividends. We pay them a check in full for the total amount of the dividend including treasury stock. They return to us the dividend allocated to the number of shares held by the company.

Q. And this check is drawn upon which bank?

A. On the First Trust Company, the First National Bank of St. Paul.

Q. And the transfer agent actually pays the dividend to the stockholders?

A. Yes, sir.

Q. And refunds you the dividend on the treasury stock?

A. Yes, sir.

Q. None of the money which you turn over to the transfer agent at the time the dividends are paid, is drawn by checks in any Wisconsin bank?

A. Yes sir, I mean they are not drawn on any Wisconsin bank.

Q. And the directors hold no meetings in the State of Wisconsin?

A. No sir.

Q. And no dividends have ever been declared in the State of Wisconsin by the taxpayer?

A. No sir.

(Discussion off the record).

Q. The Minnesota Mining Company commenced their operations of the Wausau plant when?

A. In December 1929.

Q. The first year that they operated was in the year 1930 then?

[fol. 150] A. That is right.

Q. And have they been operating the plant ever since then?

A. Yes, sir.

Q. Have you computed a balance sheet or figures showing the statement of assets and liabilities of the Wausau plant for the years 19— on December 31st, 1934, December 31st, 1935, and December 31st, 1936?

A. Yes. We don't maintain a separate set of books but we have taken the accounts from our general ledger which pertain to our Wisconsin business.

Q. And you have prepared a memorandum to that effect?

A. Yes, sir.

Paper marked Exhibit 7, AJK.

Mr. Miller: We offer that in evidence.

Mr. Best: It hasn't been identified.

Q. Showing you, Mr. Buetow, Exhibit 7, I will ask you if that is the account showing the assets and liabilities of the Wausau plant of the Minnesota Mining Company as of December 31st, 1934, 1935, and 1936.

A. Yes, sir.

Q. And this has been prepared by you from your general ledger, your depreciation book, your inventories?

A. Yes, sir.

Mr. Miller: We offer in evidence the Exhibit 7.

Mr. Best: I have no objection to the exhibit; I would like to have an opportunity to compare the figures which the auditor has obtained. I think there are some differences.

The Witness: Well, it was on the original but these have been corrected since.

Mr. Best: And I would like to reserve the objection until we have a chance to verify it.

[fol. 151] Mr. Miller: You will know that before we leave here.

Mr. Best: We will clean that up.

Mr. Miller: May me stipulate that the income of the taxpayer for the year 1930 in the state of Wisconsin was $2396.37?

Mr. Best: Before I stipulate to that I would like to know how it is going to become material?

Mr. Miller: We think it ties into that exhibit; those are cumulative figures.

Mr. Best: The sole purpose of this is to show the computation of the figure appearing on Exhibit 7 on the line captioned net earnings.

Mr. Miller: Yes; I won't say that is the sole purpose.

Mr. Connolly: That isn't the sole purpose but it will tie into this figure here by taking Mr. Kuhns' net income as shown, deducting the losses which come to this figure as the net income.

(Discussion off the record.)

Mr. Best: I will stipulate that is the correct 1930 income attributable to the activities in the State of Wisconsin.

Mr. Miller:

Q. Mr. Buetow, do you know what is the total income of the Minnesota Mining Company for the year, net income for the year 1930?

Mr. Best: I object to that as being immaterial.

Q. From all sources.

Commissioner Conway: You mean the total net income of the company?

Mr. Miller: Yes, from all sources.

[fol. 152] Commissioner Mount: How do you claim it is material?

Mr. Miller: We claim it is material as showing that the taxpayer is being called upon to pay a privilege dividend tax from earnings outside the State of Wisconsin in 1935.

Commissioner Mount: Is it your position that the dividends declared in 1935 relate to 1930 income?

Mr. Miller: In this particular case, yes sir.

Commissioner Gunderson: In what way?

Mr. Miller: I was going to develop by this witness in a few minutes all the income which we had received prior to 1935 has been paid out prior to 1935.

Commissioner Gunderson: Will you state that again please.

Mr. Miller: We intend to prove by this witness later all the income which this company received from its operations in Wisconsin prior to 1935 was paid out prior to 1935.

Commissioner Gunderson: In the form of dividends?

Mr. Miller: In the form of dividends, using this same formula that is in the dividend privilege tax law.

Mr. Best: That is in accordance with what the auditor has done. He said that the dividends paid in 1936—he said in accordance with the law those were paid out of 1935 income.

Mr. Connolly: That is correct.

Mr. Miller: May be I didn't make myself clear. It is our contention, we started to work here in 1930 and that we earned certain moneys in 1930 and subsequent years and sustained certain losses. That the net income which the company received prior to January 1st, 1935 was distributed prior to January 1st, 1935 by applying the same basis or the same formula that is in this privilege dividend tax law, and therefore, we have to show—we want to show all the materiality—it is necessary for us to show these facts to produce such a conclusion.

[fol. 153] Mr. Best: Suppose, to expedite matters, this material can go in subject—that is, that I reserve the objection in this matter; let it go in and see how it can be tied up with audit report. I don't follow counsel at the present time and I reserve the right to object to it.

Commissioner Conway: Well, up to the present time it doesn't appear that it is material.

Mr. Miller: Well, is the objection sustained then?

Mr. Best: I offered to reserve my objection, if that meets with the Commission's approval.

Commissioner Gunderson: I should think it should be received subject to the objection.

Commissioner Conway: The only thing we can do is go ahead with that.

Mr. Miller:

Q. Will you state then what the total income of the Minnesota Mining Company from all sources was in the year 1930?

A. $685,707.54.

Q. Did the Minnesota Mining Company have any income in Wisconsin or attributable to Wisconsin prior to 1930?

A. No sir.

Commissioner Mount: I didn't hear that.

A. No sir.

Mr. Miller: May it be stipulated then that the net income of the Minnesota Mining Company for Wisconsin for the year 1931 was $11,527.69, and the total income of the taxpayer from all sources for the same year was $649,547.09? That in the year 1932 the taxpayer had no income in the State of Wisconsin but sustained a net loss

of $920.77 and during that same year 1932 the total income of the taxpayer was $448,588.07. That in the year 1933 the Minnesota Mining Company had an income in the State of Wisconsin of $10,212.78, and a total income [fol. 154] from all sources of $899,829.21. That in the year 1934 the taxpayer had no income in the State of Wisconsin, but a net loss of $15,216.23, and in the same year 1934 the total income of the taxpayer from all sources was $1,203,820.30. Is that correct, Mr. Best?

Mr. Best: How about taking the other year?

Mr. Connolly: That 1935 is in.

Mr. Best: 1935 is in but not 1936.

Mr. Connolly: 1936 hasn't entered the picture yet.

Mr. Best: You have offered to prove 1936 figures with respect to royalties and with respect to interest. Now, if it is material, certainly the 1936 income is.

Mr. Connolly: That is all right, we have no objection.

Mr. Best: Why not add 1935 and 1936 to your stipulation.

Mr. Miller: That in 1935 the Minnesota Mining Company had a net income in Wisconsin of $261,157.62 subject to an offset for the previous year's loss and a total income from all sources of $1,764,460.30.

Mr. Best: The computation of which is shown in the stipulation.

Mr. Connolly: That $633,000 is in dispute.

Mr. Best: Yes, the manner in which this $764,460 item was arrived at from the book income is shown in the stipulation.

Mr. Connolly: No, not from the book income.

Mr. Best: Yes.

Mr. Connolly: That is the way it is arrived at but that isn't book income.

Mr. Miller: Paragraph two shows the book income, we contend.

Mr. Best: Well, suppose we add at this point then, in computing the total income you have just given for the [fol. 155] year 1935, there was deducted an amount of $633,656.66 which was the loss computed by the auditor to have been sustained in the Baeder Adamson Paper Mills, Incorporated, stock.

Mr. Miller: Yes, in that year.

Mr. Best: In that year.

Mr. Miller: While the taxpayer contends that the loss of 243 thousand sustained in that year—that the taxpayer, Minnesota Mining Company derived a net income from its Wisconsin operations in the year 1936 of $183,521.31 and a total income from all sources of $3,064,903.

Mr. Best: Those figures are agreed to as being correct with the two explanatory notes which are included in the stipulation.

Commissioner Mount: And without conceding the materiality.

Mr. Best: That is right.

Commissioner Mount: As to the years prior to 1935.

Mr. Best: And as to 1936.

Mr. Miller:

Q. Now, Mr. Buetow, will you tell me the amount of dividends which the Minnesota Mining Company paid in the year 1931?

A. 548.

Mr. Best: Same objection as to the materiality here, that is understood.

Mr. Miller: Received subject to the objection?

Mr. Best: Yes.

Commissioner Conway: Just what do you mean?

Mr. Miller: The Commission can rule on the objection afterwards.

Mr. Best: I will withdraw the objection if the taxpayer shows the evidence is material.

Commissioner Conway: You have the privilege to ob-[fol. 156] ject later, after you examine it, is that it?

Mr. Best: That is what I requested but Commissioner Gunderson suggested the evidence be received subject to the objection.

Commissioner Conway: Is that what the "subject to the objection" means, that you have the right to examine it? We may rule on it at that time.

Mr. Best: I think that is our understanding.

The Witness: $548,178.60.

Mr. Miller:

Q. What were the dividends paid by the Minnesota Mining Company in the year 1932?

A. $500,001.66.

Q. What were the dividends paid in the year 1933?

A. $381,071.48.

Q. What were the dividends paid in the year 1934?

A. $566,671.61.

Q. What were the dividends paid in the year 1935?

A. $690,738.54.

Q. In those computations of dividends, have you included the dividends paid upon the treasury stock or have you deducted that from those figures?

A. I have deducted the dividends on treasury stock.

Q. On January 1st, 1935, have you made any computations and can you tell the Commission as to whether or not any earnings of the State of Wisconsin—from the State of Wisconsin which you made in prior years had been retained by you or had all been distributed to the stockholders, if the same formula for determining what was the Wisconsin share of the dividends had been used?

[fol. 157] A. This computation would show that there wasn't any income remaining on that date.

Q. On January 1st, 1935, it had all been distributed prior to that time on this basis?

A. Yes, with the assumption that—in other words, can I change that. We did not include in this computation the income—we did not include in this computation the dividends paid out in the two years in which no income was earned in Wisconsin but dividends were paid by the company.

(Answer of the witness read by the reporter.)

The Witness: I should change that. It is including instead of is not. May be I better restate the whole thing here. Will you ask the question again.

Last question read by the reporter.

A. If I can restate that answer I would like to do it this way: Our computation shows that there is an excess of approximately $6000 without taking into account that share of the dividends which should be allocated according to the formula in those two years in which we sustained losses in Wisconsin.

Mr. Connolly: Name those.

A. In 1932 and 1934.

Q. And in those years how much was the total dividend you paid?

A. In the year—total dividend is $1,071,812.62.

Q. You paid that in the succeeding years, you paid a third of that in 1933 and 1935?

A. That is right.

[fol. 158] Cross-examination.

By Mr. Best:

Q. You have before you, Mr. Buetow, some sort of tabulation from which you have just given some figures?

A. Yes sir.

Q. I understand what you have done in making this computation, Mr. Buetow, is for the years in which net income was derived from Wisconsin activities you have taken the ratio of that net income to the total net income of the company for the same year?

A. Yes sir.

Q. And applied that percentage to the dividends paid in the succeeding year?

A. Yes sir.

Q. And by that means you have allocated certain dividends?

A. Yes sir.

Q. To Wisconsin earnings.

A. Yes sir.

Q. Now, the sum of those dividends plus the losses sustained from Wisconsin operations exceed the total income from Wisconsin operations by about $6000?

A. More than that. That six thousand was the excess of income over dividends without taking into account any distribution from this million dollars.

Q. The excess of the dividends over the income, not the excess of income over dividends?

A. No, this shows a slight excess, income over dividends.

Q. And the income exceeded the dividends in those four years by six thousand dollars?

A. Yes sir.

[fol. 159] Q. The losses in Wisconsin were——

A. About $16,000; you want the exact figure?

Q. About sixteen thousand, which would leave a deficit from Wisconsin operations of about $10,000 according to your calculation?

A. Yes sir.

Q. Without considering the dividends paid in the two loss years?

A. Yes sir.

Mr. Miller: And without considering this dividend of $1,078,812.62 paid in 1933 and 1935.

A. Yes, I answered that.

(Testimony at record pages 412-413 concerns Baeder Adamson loss and is omitted.)

Q. You testified to the amount of interest from government securities, Federal securities which Minnesota Mining and Manufacturing Company received in 1935; that was the amount of ten thousand some odd dollars?

A. Yes sir.

Q. That $10,000 was included in the total income?

A. Yes sir.

Q. In the auditor's privilege dividend tax report?

A. Yes sir.

Q. The same thing is true of interest and royalties received in that same year?

A. Yes sir.

Q. That is included in the total income also. Now, your office, the comptroller's office prepares balance sheets and profit and loss statements for this corporation?

A. Yes sir.

Q. And in those statements the treasury stock is shown [fol. 160] as an asset under the heading of miscellaneous investments?

A. Yes sir.

Q. And appears on the liability side of the balance sheet as outstanding capital stock?

A. Yes sir.

Q. And that same method of treatment of treasury stock is followed in the annual reports made to the stockholders?

A. Yes sir.

[fol. 161] EXHIBIT No. 5

Minnesota Mining & Manufacturing Company
St. Paul, Minnesota
2nd Revised Recomputation of
Privilege Dividend Tax Liability
On Dividends Paid
During the Years 1935 and 1936
By
Wisconsin Department of Taxation
October 15, 1941.
MEK.

[fol. 162] Minnesota Mining & Manufacturing Company
St. Paul, Minnesota

2nd Revised: Table of Contents

[fol. 163]

SCHEDULE 1

Minnesota Mining and Manufacturing Company

2nd Revised Computation of Privilege Dividend Tax

Dividend Paid	Schedule 3	1/2/36	4/1/36	7/1/36	10/1/36	12/22/36	Total
Amount of Dividend Paid	Schedule 3	$215,909.83	$216,009.72	$287,783.00	$335,863.50	$624,396.50	$.....
Per Cent of Dividend Declared and Paid out of Income Derived from Property Located and Business Transacted in Wisconsin	Schedule 2	5.2874	5.2874	5.2874	5.2874	5.2874	.....
Amount of Dividend Taxable		$ 11,416.02	$ 11,421.30	$ 15,216.24	$ 17,758.44	$ 33,014.34	$ 88,826.34
Rate of Tax		.025	.025	.025	.025	.025	.....
Privilege Dividend Tax		$ 285.40	$ 285.53	$ 380.41	$ 443.96	$ 825.36	.....
Tax Previously Paid		0	0	0	0	0	.....
Additional Privilege Dividend Tax		$ 285.40	$ 285.53	$ 380.41	$ 443.96	$ 825.36	$ 2,220.66
Penalty and Interest		.....	.....	.....	.....	.....	.....
Total Additional		.....	.....	.....	.....	.....	.....

[fol. 164]

SCHEDULE 2

Minnesota Mining and Manufacturing Company

2nd Revised Computation of Per Cent of Dividend Declared and Paid Out of Income Derived From Property Located and Business Transacted in Wisconsin

	Total	Outside	Wisconsin	Per Cent Wisconsin To Total
Corrected Surplus 12/31/29	$2,315,478.38	$2,315,478.38	$	
Dividends Paid in 1930	573,058.29	573,058.29		
	1,742,420.09	1,742,420.09		
Corrected Income 1930	591,251.89	588,855.52	2,396.37	
Surplus 12/31/30	2,333,671.98	2,331,275.61	2,396.37	.1027
Dividends Paid in 1931	576,131.40	575,539.71	591.69	.1027
	1,757,540.58	1,755,735.90	1,804.68	
Corrected Income 1931	657,340.62	645,812.93	11,527.69	
Surplus 12/31/31	2,414,881.20	2,401,548.83	13,332.37	.5521
Dividends Paid in 1932	500,001.68	497,241.17	2,760.51	.5521
	1,914,879.52	1,904,307.66	10,571.86	
Corrected Income 1932	448,540.07	449,460.84	920.77	
Surplus 12/31/32	2,363,419.59	2,353,768.50	9,651.09	.4084
Dividends Paid in 1933	381,179.08	379,622.34	1,556.74	.4084
	1,982,240.51	1,974,146.16	8,094.35	
Corrected Income 1933	889,734.22	879,521.44	10,212.78	
Surplus 12/31/33	2,871,974.73	2,853,667.60	18,307.13	.6374
Dividends Paid in 1934	566,671.61	563,059.65	3,611.96	.6374
	2,305,303.12	2,290,607.95	14,695.17	
Corrected Income 1934	1,222,640.30	1,238,056.53	15,216.23	
Surplus 12/31/34	3,528,143.42	3,528,664.48	521.06	
Dividends Paid in 1935	474,828.71	474,828.71		
	3,053,314.71	3,053,835.77	521.06	
Corrected Income 1935	1,876,110.22	1,614,952.60	261,157.62	
Surplus 12/31/35	4,929,424.93	4,668,788.37	260,636.56	5.2874
Dividends Paid in 1936	1,679,962.55	1,591,136.21	88,826.34	5.2874
	3,249,462.38	3,077,652.16	171,810.22	
Corrected Income 1936	3,064,903.00	2,881,381.69	183,521.31	
Surplus 12/31/36	$6,314,365.38	$5,959,033.85	$355,331.53	

[fol. 165] Minnesota Mining and Manufacturing Company

Schedule 3

2nd Revised Summary of Dividends Paid 9/26/35—12/31/36

Date Paid	Amt. of Dividend
1/ 2/36	$ 215,909.83
4/ 1/36	216,009.72
7/ 1/36	287,783.00
10/ 1/36	335,863.50
12/22/36	624,396.50
Total Dividends Paid in 1936	$1,679,962.55

(Here follows 1 paster, side folios 166, 167, 168)

[fol. 166]

EXHIBIT C-1 AND C-2

Minnesota Mining and Manufacturing Company

2nd Revised Reconciliation of Surplus per Books with Book Income and Corrected Total Income

	1930	1931	1932	1933	1934	1935	1936
Surplus Balance—End of Year	$2,034,840.35	$2,109,798.63	$2,068,626.59	$2,139,739.28	$2,717,364.45	$4,146,051.28	$5,343,242.22
Surplus Balance—Beginning of Year	1,940,992.32	2,034,840.35	2,109,798.63	2,068,626.59	2,139,739.28	2,717,364.45	4,146,051.28
Increase	$ 93,848.03	$ 74,958.28	$ 41,172.04	$ 71,112.69	$ 577,625.17	$1,428,686.83	$1,197,190.94
Dividends Received on Treasury Stock		624.60	4,652.76	3,410.81	10,679.66	6,167.74	1,866.25
Dividends Paid	573,225.00	576,756.00	504,654.44	384,589.89	576,751.27	696,906.28	1,465,918.97
Federal Income Tax	79,513.94	87,000.00					
Federal Tax Refund		10,697.60		18,933.26			
Depreciation Adjustment—Prior Years		12,043.53					
Loss on O. A. P. Mills Stock				71,460.00			
Write Down—B. A. P. Mills Stock				371,656.66			
Patent Amortization				10,074.99			
Federal Income Taxes (Reversed)	79,513.94	87,000.00					
Loss on Baeder Adamson Paper Mills, Inc. Stock		116,190.00				243,000.00	
Dividend on Unlocated Stock	166.71						
Premium on Debenture Bonds Called		4,250.00					
Book Income per Surplus Account	$ 666,906.32	$ 748,788.55	$ 458,829.64	$ 886,550.16	$1,144,296.78	$2,362,425.37	$2,661,243.66
Audit Adjustments—Premium on Debenture Bonds		4,250.00					
Life Insurance Premiums	1,841.54	3,866.14	3,900.00	3,943.35	4,038.55	4,195.85	4,205.29
Loss on B. A. P. Mills Stock		116,190.00		71,460.00	19,000.00	633,656.66	
Federal Tax Refund		10,697.60		18,933.26			
Reserve for Federal and State Taxes	79,513.94	87,000.00	72,500.00	136,098.00	182,327.00	350,000.00	675,000.00
Federal and State Taxes Paid	157,009.91	84,615.20	86,689.57	74,255.56	126,822.03	206,854.34	275,545.95
Patents Charged Off				10,074.99			
Depreciation Adjustments Through Surplus		12,043.53					
Net Adjusted Income (On Wisconsin Income Tax Basis)	$ 591,251.89	$ 657,340.62	$ 448,540.07	$ 889,734.22	$1,222,840.30	$1,876,110.22	$3,064,903.00

[fol. 167]

EXHIBIT D

Minnesota Mining and Manufacturing Company

2nd Revised Reconciliation of Surplus per Books with Corrected Surplus

	12/31/29	12/31/30	12/31/31	12/31/32	12/31/33	12/31/34	12/31/35	12/31/36
Surplus per Books	$1,940,992.32	$2,034,840.35	$2,109,798.63	$2,068,626.59	$2,139,739.28	$2,717,364.45	$4,146,051.28	$5,343,242.22
Reserve for Loss on Baeder Adamson Paper Mills Inc					371,656.66	390,656.66		
Reserve for Bad Debts	10,000.00	10,000.00	10,000.00	10,000.00	10,000.00	10,000.00	10,000.00	10,000.00
Reserve for Federal and State Taxes	179,486.06	101,990.09	104,374.89	90,185.32	152,027.76	207,582.73	350,678.39	750,132.44
Life Insurance Premiums Capitalized (1930–1939)		1,841.54	5,707.68	9,607.68	13,551.03	17,589.58	21,785.43	25,990.72
Reserve Crystal Bay Real Estate	185,000.00	185,000.00	185,000.00	185,000.00	185,000.00	185,000.00	185,000.00	185,000.00
Corrected Surplus	$2,315,478.38	$2,333,671.98	$2,414,881.20	$2,363,419.59	$2,871,974.73	$3,528,143.42	$4,713,515.10	$6,314,365.38

[fol. 169] EXHIBIT No. 9

Minnesota Mining and Manufacturing Company
St. Paul, Minnesota

2nd revised recomputation of privilege dividend tax liability on dividends paid during the year 1937 by Wisconsin Department of Taxation.
October 15, 1941. MEK.

[fol. 170] Minnesota Mining and Manufacturing Company
St. Paul, Minnesota

2nd Revised: Table of Contents

[fol. 171]

SCHEDULE 1

Minnesota Mining and Manufacturing Company

2nd Revised Computation of Privilege Dividend Tax

Dividend Paid		3/31/37	6/29/37	9/29/37	12/30/37	Total
Amount of Dividend Paid	Schedule 3	$383,892.00	$479,865.00	$575,838.00	$719,797.50	$.....
Per Cent of Dividend Declared and Paid out of Income Derived from Property Located and Business Transacted in Wisconsin	Schedule 2	5.6274	5.6274	5.6274	5.6274	.....
Amount of Dividend Taxable		$ 21,603.14	$ 27,003.92	$ 32,404.71	$ 40,505.88	$121,517.65
Rate of Tax		.025	.025	.025	.025	.....
Privilege Dividend Tax		$ 540.08	$ 675.10	$ 810.12	$ 1,012.65	.....
Tax Previously Paid		0	0	0	0	.....
Additional Privilege Dividend Tax		$ 540.08	$ 675.10	$ 810.12	$ 1,012.65	$ 3,037.95
Penalty and Interest		.....	.....	.....	.....	.....
Total Additional		$.....	$.....	$.....	$.....	$.....

[fol. 172] SCHEDULE 2

Minnesota Mining and Manufacturing Company

2nd Revised Computation of Per Cent of Dividend Declared and Paid Out of Income Derived From Property Located and Business Transacted in Wisconsin

	Total	Outside	Wisconsin	Per Cent Wisconsin To Total
Corrected Surplus 12/31/36	$6,314,365.38	$5,959,033.85	$355,331.53	5.6274
Dividends Paid in 1937....	2,159,392.50	2,037,874.85	121,517.65	5.6274
	4,154,972.88	3,921,159.00	233,813.88	
Corrected Income 1937....	3,797,049.45	3,745,921.38	51,128.07	
Surplus 12/31/37.....	$7,952,022.33	$7,667,080.38	$284,941.95	

[fol. 173] Minnesota Mining and Manufacturing Company

Schedule 3

2nd Revised Summary of Dividends Paid 1/1/37—12/31/37

Date Paid	Amt. of Dividend
3/31/37	$ 383,892.00
6/29/37	479,865.00
9/29/37	575,838.00
12/30/37	719,797.50
* Total Dividends Paid in 1937	$2,159,392.50

* No data on hand to determine allocation of dividends paid on Treasury Stock. Total Dividends paid was $2,162,835.00 of which $3,442.50 was paid on Treasury Stock. Total dividend per share paid in 1937 was $2.25.

$3,442.50 ÷ 2.25 = 1530 which is used as the average number of shares of Treasury Stock in determining the net quarterly dividend paid on such stock in 1937.

[fol. 174] Minnesota Mining and Manufacturing Company

Exhibit C-1 and C-2

2nd Revised Reconciliation of Surplus Per Books with Book Income and Corrected Total Income

	1937
Surplus Balance—End of Year	$6,683,915.78
Surplus Balance—Beginning of Year	5,343,242.22
Increase	$1,340,673.56
Dividends Received on Treasury Stock	$ 3,442.50
Dividends Paid	2,162,835.00
Depreciation Adjustment—Prior Years	90,981.50
Patent Amortization	110.95
Book Income per Surplus Account	$3,408,973.61
Audit Adjustments:	
Life Insurance Premiums	$ 4,050.54
Reserve for Federal and State Taxes	1,025,000.00
Federal and State Taxes Paid	742,067.15
Patents Charged Off	110.95
Depreciation Adjustments Through Surplus	90,981.50
Reserve for Doubtful Accounts	10,000.00
Net Adjusted Income (on Wisconsin Income Tax Basis)	$3,797,049.45

[fol. 175] Minnesota Mining and Manufacturing Company

Exhibit D

2nd Revised Reconciliation of Surplus Per Books with Corrected Surplus

	12/31/37
Surplus per Books	$6,683,915.78
Reserve for Bad Debts	20,000.00
Reserve for Federal and State Taxes	1,033,065.29
Life Insurance Premiums Capitalized	30,041.26
Reserve Crystal Bay Real Estate	185,000.00
Corrected Surplus	$7,952,022.33

[fol. 176] Minnesota Mining and Manufacturing Company

Exhibit D-1

2nd Revised Reconciliation of Corrected Surplus Beginning of Year with Corrected Surplus End of Year

	1937
Corrected Surplus Balance—Beginning of Year	$6,314,365.38
Corrected Income	3,797,049.45
Dividends Paid	2,162,835.00
Dividends Received on Treasury Stock	3,442.50
Corrected Surplus Balance—End of Year	$7,952,022.33
Income Allocated to Wisconsin and Taxed	$ 51,128.07

[fol. 177] Exhibit No. 13

Minnesota Mining and Manufacturing Company, St. Paul, Minnesota

2nd Revised Recomputation of Privilege Dividend Tax Liability on Dividends Paid During the Years 1938 to 1940, Inclusive. By Wisconsin Department of Taxation. October 15, 1941.
MEK.

[fol. 178] Minnesota Mining and Manufacturing Company, St. Paul, Minnesota.

2nd Revised: Table of Contents

(Here follows 1 paster, side folio 179)

[fol. 179]

SCHEDULE 1

Minnesota Mining and Manufacturing Company

2nd Revised Computation of Privilege Dividend Tax

Dividend Paid		3/29/38	6/28/38	9/29/38	12/21/38	3/30/39	6/28/39	9/27/39	12/20/39	3/28/40
Amount of Dividend Paid	Schedule 3	$384,504.00	$384,504.00	$384,504.00	$576,756.00	$480,630.00	$480,630.00	$624,819.00	$720,945.00	$576,756.00
Per Cent of Dividend Declared and Paid out of Income Derived from Property Located and Business Transacted in Wisconsin	Schedule 2	3.5833	3.5833	3.5833	3.5833	6.0652	6.0652	6.0652	6.0652	5.5639
Amount of Dividend Taxable		13,777.93	13,777.93	13,777.93	20,666.90	29,151.17	29,151.17	37,896.52	43,726.76	32,090.13
Rate of Tax		.025	.025	.025	.025	.025	.025	.03	.03	.03
Privilege Dividend Tax		344.45	344.45	344.45	516.67	728.78	728.78	1,136.90	1,311.80	962.70
Tax Previously Paid		0	0	0	0	0	0	0	0	0
Additional Privilege Dividend Tax		$ 344.45	$ 344.45	$ 344.45	$ 516.67	$ 728.78	$ 728.78	$ 1,136.90	$ 1,311.80	$ 962.70
Penalty and Interest										
Total Additional										

SCHEDULE 1

Minnesota Mining and Manufacturing Company

2nd Revised Computation of Privilege Dividend Tax

Schedule 3	3/29/38	6/28/38	9/29/38	12/21/38	3/30/39	6/28/39	9/27/39	12/20/39	3/28/40	6/27/40	9/28/40	12/19/40	Total
Schedule 3	$384,504.00	$384,504.00	$384,504.00	$576,756.00	$480,630.00	$480,630.00	$624,819.00	$720,945.00	$576,756.00	$576,756.00	$576,756.00	$576,756.00	$.....
Schedule 2	3.5833	3.5833	3.5833	3.5833	6.0652	6.0652	6.0652	6.0652	5.5639	5.5639	5.5639	5.5639	.....
.....	13,777.93	13,777.93	13,777.93	20,666.90	29,151.17	29,151.17	37,896.52	43,726.76	32,090.13	32,090.13	32,090.13	32,090.12	330,286.82
.....	.025	.025	.025	.025	.025	.025	.03	.03	.03	.03	.03	.03	.....
.....	344.45	344.45	344.45	516.67	728.78	728.78	1,136.90	1,311.80	962.70	962.70	962.70	962.70	.....
.....	0	0	0	0	0	0	0	0	0	0	0	0	.....
.....	$ 344.45	$ 344.45	$ 344.45	$ 516.67	$ 728.78	$ 728.78	$ 1,136.90	$ 1,311.80	$ 962.70	$ 962.70	$ 962.70	$ 962.70	$ 9,307.08
.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....

Increase	$ 93,848.03	$ 74,958.28	$ 41,172.04	$ 71,112.69	$ 577,625.17	$1,428,686.83	$1,197,190.94
Dividends Received on Treasury Stock		624.60	4,652.76	3,410.81	10,079.66	6,167.74	1,866.25
Dividends Paid	573,225.00	576,756.00	504,654.44	384,589.89	576,751.27	696,906.28	1,465,918.97
Federal Income Tax	79,513.94	87,000.00					
Federal Tax Refund		10,697.60		18,933.26			
Depreciation Adjustment—Prior Years		12,043.53					
Loss on O. A. P. Mills Stock				71,460.00			
Write Down—B. A. P. Mills Stock				371,656.66			
Patent Amortization				10,074.99			
Federal Income Taxes (Reversed)	79,513.94	87,000.00					
Loss on Baeder Adamson Paper Mills, Inc. Stock		116,190.00				243,000.00	
Dividend on Unlocated Stock	166.71						
Premium on Debenture Bonds Called		4,250.00					
Book Income per Surplus Account	$ 666,906.32	$ 748,788.55	$ 458,829.64	$ 886,550.16	$1,144,296.78	$2,362,425.37	$2,661,243.66
Audit Adjustments—Premium on Debenture Bonds		4,250.00					
Life Insurance Premiums	1,841.54	3,866.14	3,900.00	3,943.35	4,038.55	4,195.85	4,205.29
Loss on B. A. P. Mills Stock		116,190.00		71,460.00	19,000.00	633,656.66	
Federal Tax Refund		10,697.60		18,933.26			
Reserve for Federal and State Taxes	79,513.94	87,000.00	72,500.00	136,098.00	182,327.00	350,000.00	675,000.00
Federal and State Taxes Paid	157,009.91	84,615.20	86,689.57	74,255.56	126,822.03	206,854.34	275,545.95
Patents Charged Off				10,074.99			
Depreciation Adjustments Through Surplus		12,043.53					
Net Adjusted Income (On Wisconsin Income Tax Basis)	$ 591,251.89	$ 657,340.62	$ 448,540.07	$ 889,734.22	$1,222,840.30	$1,876,110.22	$3,064,903.00

[fol. 167]

EXHIBIT D

Minnesota Mining and Manufacturing Company

2nd Revised Reconciliation of Surplus per Books with Corrected Surplus

	12/31/29	12/31/30	12/31/31	12/31/32	12/31/33	12/31/34	12/31/35	12/31/36
Surplus per Books	$1,940,992.32	$2,034,840.35	$2,109,798.63	$2,068,626.59	$2,139,739.28	$2,717,364.45	$4,146,051.28	$5,343,242.22
Reserve for Loss on Baeder Adamson Paper Mills Inc					371,656.66	390,656.66		
Reserve for Bad Debts	10,000.00	10,000.00	10,000.00	10,000.00	10,000.00	10,000.00	10,000.00	10,000.00
Reserve for Federal and State Taxes	179,486.06	101,990.09	104,374.89	90,185.32	152,027.76	207,532.73	350,678.39	750,132.44
Life Insurance Premiums Capitalized (1930-1939)		1,841.54	5,707.68	9,607.68	13,551.03	17,589.58	21,785.43	25,990.72
Reserve Crystal Bay Real Estate	185,000.00	185,000.00	185,000.00	185,000.00	185,000.00	185,000.00	185,000.00	185,000.00
Corrected Surplus	$2,315,478.38	$2,333,671.98	$2,414,881.20	$2,363,419.59	$2,871,974.73	$3,528,143.42	$4,713,515.10	$6,314,365.38

[fol. 168]

EXHIBIT D-1

Minnesota Mining and Manufacturing Company

2nd Revised Reconciliation of Corrected Surplus Beginning of Year With Corrected Surplus End of Year

	1930	1931	1932	1933	1934	1935	1936
Corrected Surplus Balance—Beginning of Year	$2,315,478.38	$2,333,671.98	$2,414,881.20	$2,363,419.59	$2,871,974.73	$3,528,143.42	$4,713,515.10
Corrected Income	591,251.89	657,340.62	448,540.07	889,734.22	1,222,840.30	1,876,110.22	3,064,903.00
Dividends Paid	573,225.00	576,756.00	504,654.44	384,589.89	576,751.27	696,906.28	1,465,918.97
Dividend on Unlocated Stock	166.71						
Dividend Received on Treasury Stock		624.60	4,652.76	3,410.81	10,079.66	6,167.74	1,866.25
Corrected Surplus Balance—End of Year	$2,333,671.98	$2,414,881.20	$2,363,419.59	$2,871,974.73	$3,528,143.42	$4,713,515.10	$6,314,365.38
Income Allocated to Wisconsin and Taxed	$ 2,396.37	$ 11,527.69	$ 920.77	$ 10,212.78	$ 15,216.23	$ 261,157.62	$ 183,521.31

[fol. 180]

SCHEDULE 2

Minnesota Mining and Manufacturing Company

2nd Revised Computation of Per Cent of Dividend Declared and Paid Out of Income Derived From Property Located and Business Transacted in Wisconsin

	Total	Outside	Wisconsin	Per Cent Wisconsin To Total
Corrected Surplus 12/31/37	$ 7,952,022.33	$ 7,667,080.38	$284,941.95	3.5833
Dividends Paid in 1938	1,730,268.00	1,668,267.31	62,000.69	3.5833
	6,221,754.33	5,998,813.07	222,941.26	
Corrected Income 1938	3,233,970.80	2,883,398.83	350,571.97	
Surplus 12/31/38	9,455,725.13	8,882,211.90	573,513.23	6.0652
Dividends Paid in 1939	2,307,024.00	2,167,098.38	139,925.62	6.0652
	7,148,701.13	6,715,113.52	433,587.61	
Corrected Income 1939	4,660,233.88	4,436,784.76	223,449.12	
Surplus 12/31/39	$11,808,935.01	$11,151,898.28	$657,036.73	5.5639
Dividends Paid in 1940	2,307,024.00	2,178,663.49	128,360.51	5.5639
Balance of 12/31/39 Surplus after Deduction of 1940 Dividends	$ 9,501,911.01	$ 8,973,234.79	$528,676.22	

[fol. 181]

SCHEDULE 3

Minnesota Mining and Manufacturing Company

2nd Revised Summary of Dividends Paid 1/1/38-12/31/40

Date Paid	Amount of Dividend
3/29/38	$ 384,504.00
6/28/38	384,504.00
9/29/38	384,504.00
12/21/38	576,756.00
Total Dividends Paid in 1938	$1,730,268.00
3/30/39	$ 480,630.00
6/28/39	480,630.00
9/27/39	624,819.00
12/29/39	720,945.00
Total Dividends Paid in 1939	$2,307,024.00
3/28/40	$ 576,756.00
6/27/40	576,756.00
9/28/40	576,756.00
12/19/40	576,756.00
Total Dividends Paid in 1940	$2,307,024.00

[fol. 182] EXHIBIT C-1 AND C-2

Minnesota Mining and Manufacturing Company

2nd Revised Reconciliation of Surplus Per Books With Book Income and Corrected Total Income

	1938	1939
Surplus Balance — End of Year	$8,360,402.12	$10,397,257.35
Surplus Balance — Beginning of Year	6,683,915.78	8,360,402.12
Increase	$1,676,486.34	$ 2,036,855.23
Dividends Paid	1,730,268.00	2,307,024.00
Write-Down of Patents		21,096.02
Book Income Per Surplus Account	$3,406,754.34	$ 4,364,975.25
Audit Adjustments:		
Life Insurance Premiums	$ 4,127.75	$ 5,796.18
Reserve for Federal and State Taxes	840,000.00	1,090,000.00
Federal and State Taxes Paid	1,017,653.19	815,186.90
Patents Charged Off		19,561.90
Patent Amortization Deductible		4,170.65
Deposit on Wisconsin Income Tax	741.90	741.90
Net Adjusted Income (On Wisconsin Income Tax Basis)	$3,233,970.80	$ 4,660,233.88

[fol. 183] EXHIBIT D

Minnesota Mining and Manufacturing Company

2nd Revised Reconciliation of Surplus Per Books With Corrected Surplus

	12/31/38	12/31/39
Surplus Per Books	$8,360,402.12	$10,397,257.35
Reserve for Bad Debts	20,000.00	20,000.00
Reserve for Federal and State Taxes	855,412.10	1,130,225.20
Patent Expense Written Off Restored		40,657.92
Amortization of Patent Expense		4,170.65
Deposit on Wisconsin Income Tax	741.90	
Life Insurance Premiums Capitalized	34,169.01	39,965.19
Reserve Crystal Bay Real Estate	185,000.00	185,000.00
Corrected Surplus	$9,455,725.13	$11,808,935.01

[fol. 184] EXHIBIT D-1

Minnesota Mining and Manufacturing Company

2nd Revised Reconciliation of Corrected Surplus Beginning of Year With Corrected Surplus End of Year

	1938	1939
Corrected Surplus Balance—Beginning of Year	$7,952,022.33	$9,455,725.13
Corrected Income	3,233,970.80	4,660,233.88
Dividend Paid	1,730,268.00	2,307,024.00
Corrected Surplus Balance—End of Year	$8,455,725.13	$11,808,935.01
Income Allocated to Wisconsin and Taxed	$350,571.97	$223,449.12

[fol. 185] EXHIBIT 14

WISCONSIN BOARD OF TAX APPEALS, MADISON, WISCONSIN

Docket Nos. D-43, D-614, and D—

MINNESOTA MINING & MANUFACTURING COMPANY, Petitioner,

vs.

WISCONSIN DEPARTMENT OF TAXATION, Respondent

STIPULATION OF FACTS

It is hereby stipulated by and between the Wisconsin Department of Taxation and the Minnesota Mining and Manufacturing Company, a corporation, that in determination of the above appeals before the Board the following facts are admitted:

I

Petitioner brings this case before the Board contesting the validity of respondent's proposed assessments alleged to be due the State of Wisconsin from petitioner for privilege dividend taxes on dividends paid during the years 1936, 1937, 1938, 1939 and 1940. The question of whether or not petitioner was liable for privilege dividend tax on dividends paid in 1936 was before the Supreme Court of the State of Wisconsin in the case of Minnesota Mining & Manufacturing Company v. Wisconsin Tax Commissioner, State of Wisconsin, and Emer E. Barlow as Commissioner of Taxation for the State of Wisconsin; and under date of May 20, 1941 the Supreme Court entered its decision, order and judgment reversing the judgment of the Dane County Court with directions to remand the record to the Commissioner of Taxation for further proceedings as indicated in the opinion of the Court.

[fol. 186] All steps necessary to be performed by the respondent and petitioner to bring before this Board the question of the petitioner's liability for privilege dividend taxes on dividends paid during the years 1936 and 1937 and from Mar. 29, 1938 to and including December 19, 1940, have been performed.

The following is a statement of the principal amounts of the privilege dividend taxes respondent claimed to be due and owing from petitioner as involved in this hearing:

Privilege Dividend Tax on Dividends Paid During:	In the Amount of:
1936	$2,220.66
1937	3,237.75
1938 to 1940	9,390.16

II

Petitioner is a corporation duly organized and existing under and by virtue of the laws of the State of Delaware with its principal place of business in the City of Saint Paul, State of Minnesota, operating a factory manufacturing Colorquartz at Wausau, Wisconsin. The First Trust Company of Saint Paul is the transfer agent for the petitioner. All dividends were declared at meetings of the Board of Directors in Saint Paul; no dividends were declared in Wisconsin; all dividends paid by the petitioner during the period affected by the taxes in question were paid to the transfer agent in Saint Paul by a check drawn on a Saint Paul bank and by it distributed to the stockholders of the petitioner.

Petitioner operates a factory at Wausau, Wisconsin, manufacturing roofing granules (known to the trade as "Colorquartz"). This factory ships its products to Chicago and points west. The sales from the Wausau plant are handled through a Mr. Voss, who has an office in Chicago. He contacts various roofing companies and gets orders for roofing [fol. 187] granules, send the orders to Saint Paul, and shipping instructions are sent from roofing companies to Saint Paul where decision is made as to when the shipment shall be made. When shipments are made, the Wausau plant prepares a shipping ticket, upon which is shown the tonnage shipped. This ticket is sent to Saint Paul where it is priced and the bill sent from Saint Paul to the consumer. The consumer remits directly to Saint Paul, and those funds are commingled with funds from other factories and other divisions of petitioner's business, and are deposited in Saint Paul banks. These funds are used to pay all bills, royalties and dividends. The employees of petitioner are paid on time cards prepared at the Wausau

plant and sent to Saint Paul, where extensions are made and checks are drawn on a Wausau bank, signed by an officer at Saint Paul and sent to the Wausau plant manager for distribution. A deposit in equal amount to the total of the payroll is sent the same day to the Wausau bank. The petitioner operates factories at Detroit, Michigan; Copley, Ohio; and Saint Paul, Minnesota.

III

From September 26, 1935 up to and including December 31, 1940, petitioner declared and paid the following amounts as dividends:

Date paid	Amount of dividend	Total
1/2/36	$215,909.83	
4/1/36	216,009.72	
7/1/36	287,783.00	
10/1/36	335,863.50	
12/22/36	624,396.50	
		$1,679,962.55
3/31/37	383,892.00	
6/29/37	479,865.00	
9/29/37	575,838.00	
12/30/37	719,797.50	
		2,159,392.50
[fols. 188-192]		
3/29/38	384,504.00	
6/28/38	384,504.00	
9/29/38	384,504.00	
12/21/38	576,756.00	
		1,730,268.00
3/30/39	480,630.00	
6/28/39	480,630.00	
9/27/39	624,819.00	
12/20/39	720,945.00	
		2,307,024.00
3/28/40	576,756.00	
6/27/40	576,756.00	
9/28/40	576,756.00	
12/19/40	576,756.00	
		2,307,024.00

IV

During the years 1935, 1936, 1937, 1938 and 1939 and 1940 petitioner's Board of Directors adopted the following resolutions on the specific dates hereinafter mentioned:

December 16, 1935:

"Resolved, that the Board of Directors of the Corporation do hereby declare from the surplus earnings of the corporation and/or surplus available for dividends, a quarterly dividend of seventeen and one-half cents ($0.17½) and five cents ($0.05) extra on each share of its capital stock without par value issued and outstanding (except to such shares of stock as have been purchased by the corporation and are held by it as Treasury stock) payable on the second day of January, 1936, to holders of record of such stock at the close of business on the twentieth day of December, 1935."

[Dividend resolutions for years 1936 to 1940 inc. omitted from this print because they are substantially the same as the December 16, 1935 dividend resolution.]

[fol. 193] Said dividends were paid pursuant to Section 34 of the Delaware Corporation Law, which reads as follows:

"The directors of every corporation created under this Chapter, subject to any restrictions contained in its Certificate of Incorporation, shall have power to declare and pay dividends upon the shares of its capital stock either (a) out of its net assets in excess of its capital as computed in accordance with the provisions of Sections 14, 26, 27, and 28 of this Chapter, or (b), in case there shall be no such excess, out of its net profits for the fiscal year then current and/or the preceding fiscal year."

and pursuant to a subsequent section which provides:

"No corporation created under the provisions of this Chapter, nor the Directors thereof, shall pay dividends upon any shares of the corporation except in accordance with the provisions of this Chapter."

The petitioner and respondent shall have the right at the hearing before this Board to introduce additional evi-

dence with respect to the issues involved on these petitions to review.

Dated, this 17 day of November, 1941.

Minnesota Mining & Manufacturing Co., by John L. Connolly and G. Burgess Ela by G. Burgess Ela.
Wisconsin Department of Taxation, by Elmer E. Barlow, Richard R. Teschner.

[fol. 194] BEFORE WISCONSIN BOARD OF TAX APPEALS

Docket Nos. D-43, D-614, D-624

MINNESOTA MINING AND MANUFACTURING COMPANY, a Delaware corporation, Petitioner,

vs.

WISCONSIN DEPARTMENT OF TAXATION, Respondent

DECISION AND ORDER—February 13, 1942

Three cases, all involving assessments of Wisconsin privilege dividend taxes, are here consolidated for the purpose of determination. They are appeals from the assessment of such taxes by the Wisconsin Tax Commission and its successor, the respondent, for the years 1936 to 1940, inclusive, and from the denial by the respondent of petitioner's application for abatement thereof in each case. These appeals pertain to taxes alleged to be due on dividends paid as follows: D-624 in the year 1936; D-43 in the year 1937; and D-614 in the years 1938, 1939, and 1940.

We make the following findings of fact: The petitioner is a Delaware corporation with its principal office and place of business in St. Paul, Minnesota. It operated a factory at Wausau, Wisconsin, manufacturing roofing granules. It purchased this factory in 1929 and began manufacturing operations therein in 1930. Sales are made through an office in Chicago, Illinois but all orders are confirmed at the St. Paul office, and shipping instructions are forwarded from there. Purchasers of products manufactured in Wisconsin remit direct to the St. Paul office and the proceeds are there mingled with funds from sales from other factories and other divisions of petitioner's business. Checks [fol. 195] for payrolls are prepared at the St. Paul office

and are drawn on a Wausau bank. A deposit equaling the amount of the payroll is forwarded to the Wausau Bank on the same day the checks are forwarded.

The Company reports on a calendar year basis, taking an inventory and closing its books as of December 31 of each year. The Company maintains but one general surplus account and none of the earnings derived by it from property located in or business transacted in Wisconsin are segregated in any way. The petitioner does not maintain a separate balance sheet for Wisconsin operations, nor is there a separate surplus account for this state.

All dividends during the years in question were declared by the Board of Directors of the Company at meetings held in St. Paul. The First Trust Company of St. Paul is the transfer agent for the petitioner. All of the dividends paid by the petitioner during the period here under review were paid to the transfer agent in St. Paul by a check drawn on a St. Paul bank and distributed to the Company's stockholders by the transfer agent. Dividends were paid from surplus, pursuant to the laws of Delaware, and not from current earnings.

The petitioner challenges the validity of the assessments made for the several years here involved and contends:

First, that the Wisconsin privilege dividend tax law is unconstitutional; Second, that the respondent's method of computing the tax is invalid; Third, that the assessments, if found to be valid, should not be subject to penalties and interest.

[fol. 196] The Wisconsin statutes here involved are Section 71.60, Section 3, (1), (2) and (4):

> "(1) For the privilege of declaring and receiving dividends, out of income derived from property located and business transacted in this state, there is hereby imposed a tax equal to three per centum of the amount of such dividends declared and paid by all corporations (foreign and local), except those specified in paragraphs (d) and (g) of sub-section (1) of section 71.05 of the statutes, after the passage and publication of this act and prior to July 1, 1941. Such tax shall be deducted and withheld from such dividends payable to residents and nonresidents by the payor corporation.

"(2) Every corporation required to deduct and withhold any tax under this section shall, on or before the last day of the month following the payment of the dividend, make return thereof and pay the tax to the tax commission, reporting such tax on the forms to be prescribed by the tax commission.

"* * *

"(4) In the case of corporations doing business within and without the state of Wisconsin, such tax shall apply only to dividends declared and paid out of income derived from business transacted and property located within the state of Wisconsin. The amount of income attributable to this state shall be computed in accordance with the provisions of chapter 71. In the absence of proof to the contrary, such dividends shall be presumed to have been paid out of earnings of such corporation attributable to Wisconsin under the provisions of chapter 71, for the year immediately preceding the payment of such dividends. If a corporation had a loss for the year prior to the payment of the dividend, the tax commission shall upon application, determine the portion of such dividend paid out of corporate surplus and undivided profits derived from business transacted and property located within the state."

In our opinion the following decisions clearly hold that the Wisconsin privilege dividend tax law is constitutional: *State ex rel. Froedtert Grain and Malting Company* vs. *Wisconsin Tax Commission*, 221 Wis. 225; *Minnesota Mining and Manufacturing Company* vs. *Wisconsin Tax Com-*
[fol. 197] *mission*, 298 N. W. 186; *J. C. Penney Company* vs. *Wisconsin Department of Taxation, et al.*, 311 U. S. 435.

We find that the respondent's computations of privilege dividend taxes due from the petitioner were proper and valid and complied with that statute as construed by the Wisconsin Supreme Court in Minnesota Mining and Manufacturing Company, supra. Appeal of International Harvester Company. WBTA (decided February 13, 1942).

The privilege dividend tax law requires every corporation liable under the law to make a return thereof and pay the tax to the respondent on or before the last day of the month following the payment of dividends. There is no

statutory provision for the waiver of interest and penalties and in our opinion the amounts due from the petitioner during the years in question as recomputed by the respondent are subject to the interest and penalties prescribed by law. *Laabs.* vs. *Tax Commission,* 218 Wis. 414.

We find the correct assessment for the several periods here involved to be:

D-624	1936	$2,220.66
D-43	1937	3,037.75
D-614	1938, 1939, 1940	9,307.08

To the above amounts interest and penalties are to be added as provided by law.

It Is Ordered:

That the additional assessments appealed from be and the same are hereby modified to conform to the findings announced herein, and as so modified, the assessments are hereby affirmed.

[fol. 198] Dated at the State Capitol, Madison, Wisconsin, this 13th day of February, 1942.

Wisconsin Board of Tax Appeals. G. L. Broadfoot, Chairman; W. J. Conway, Harry Slater.

[fol. 199] In Circuit Court of Dane County

In the Matter of

Minnesota Mining and Manufacturing Company

Wisconsin Privilege Dividend Taxes

Notice of Appeal

from decision and order of Wisconsin Board of Tax Appeals dated February 13, 1942, confirming and modifying additional assessments with respect to dividends paid by Minnesota Mining & Mfg. Co. between Jan. 2, 1936 to and including Dec. 19, 1940, inclusive.

To the State of Wisconsin, and Particularly to the Tax Commissioner and the Wisconsin Department of Taxation:

Please take notice that Minnesota Mining and Manufacturing Company hereby appeals to the Circuit Court for

Dane County, Wisconsin, from the whole of the decision and order of the Wisconsin Board of Tax Appeals, which said decision bears date February 13, 1942, a copy of which decision is hereto attached and marked Exhibit "1" and is hereby referred to and made part of this notice.

This appeal involves an appeal from an order modifying and affirming three separate assessments,—one with respect to dividends paid by the corporation from the date of the enactment of the privilege dividend tax law to and including the year 1936, one with respect to dividends paid by the corporation during the year 1937, and one with respect to dividends paid by the corporation during the years 1938, 1939 and 1940 inclusive.

The Objections to Order and Decision and to Assessments

The objections to said order and decision and to the assessments made are as follows:

[fol. 200] (1) The assessments and decision are void and of no effect whatsoever by reason of the fact that the purported law on which said assessments and purported tax is based, as it was applied by the Wisconsin Tax Commission and the Wisconsin Department of Taxation, is unconstitutional both under the Constitution of the United States of America and the Constitution of the State of Wisconsin, and particularly under the Fourteenth Amendment of the Constitution of the United States of America; Article I, Section 1 of the Constitution of the State of Wisconsin; Article I, Section 8, Constitution of the United States of America; Article I, Section 10 of the Constitution of the United States of America; Article I, Section 9 of the Constitution of the State of Wisconsin; Article I, Section 12 of the Constitution of the State of Wisconsin; Article VIII, Section 1; Constitution of the State of Wisconsin; and Article IV, Section 1, Constitution of the United States of America.

(2) That said assessments are invalid, in that it is assumed that the dividends upon which the assessments were based included payment of Wisconsin earnings, when in fact the proof showed that Wisconsin earnings were not included.

(3) That assuming, but not admitting, that the law as applied to the dividends declared and paid by the Minne-

sota Mining and Manufacturing Company is valid, the method of computation used by the Wisconsin Tax Commission and the Department of Taxation as modified and confirmed by the Board of Tax Appeals is invalid and not in accordance with the law.

(4) That the additional assessments as confirmed are based upon computations predicated on presumptions contrary to the facts and not authorized or contemplated by the privilege dividend tax law.

[fol. 201] (5) That the assessments as modified and confirmed are improperly made, in that even assuming that the law could be applied to the dividends of the Minnesota Mining and Manufacturing Company in a constitutional manner, are invalid because the method of computation is erroneous.

(6) That if any portion of the assessments are valid, such assessments should not be subject to penalties and interest in view of various considerations apparent in the record in this case.

(7) That assuming, but not admitting, that the privilege dividend tax law is constitutional as applied to foreign corporations, and assuming further, but not admitting, that there are some Wisconsin earnings in a particular dividend, it is impossible to ascertain the amount of such Wisconsin earnings, if any, in such dividend as of a dividend paying date, and accordingly any conceivable jurisdictional basis for the imposition of any tax is wholly lacking.

(8) That if any part of the assessments are correct (which is denied), under the circumstances no penalties or interest are properly chargeable.

Statement of Ultimate Facts Upon Which Appellant Relies

From the record herein made before the Wisconsin Board of Tax Appeals it appears that the Minnesota Mining and Manufacturing Company is a corporation existing under the laws of the State of Delaware; Minnesota Mining and Manufacturing Company is also licensed to do business in the State of Wisconsin, and is also qualified and licensed to do business in many other states of the United States; Minnesota Mining and Manufacturing Com-

pany paid an income tax to the State of Wisconsin on its income, as required by the laws of Wisconsin, for the years 1935 to 1940, inclusive and for some years prior thereto. [fol. 202] Minnesota Mining and Manufacturing Company presently is conducting, and during the years 1935 to 1940 inclusive and for many years prior thereto did conduct, a manufacturing business in the States of Minnesota, Wisconsin, Michigan and Ohio, and sells and has sold its products in several states in the Union and in foreign countries; that the Company owns a substantial amount of stock in corporations and has earnings accruing to it from royalties and receives interest from several federal securities owned by it.

The principal office for the transaction of the business of said appellant is in St. Paul, Minnesota, although a statutory office of the company is in Wilmington, Delaware. All meetings of stockholders and all meetings of directors during the years 1935 to 1940, inclusive, and for many years prior thereto, have been held in the State of Minnesota, and no meetings of directors or of stockholders have ever been held within the State of Wisconsin.

The Company has a factory at Wausau, Wisconsin, where it manufacturers Colorquartz and ships all the products of said factory to Chicago or points east. The sales of such products are made from the Chicago office of the Company and the proceeds of such sales are remitted by the purchaser directly to the St. Paul office of the Company and deposited by the Company in banks in St. Paul. At all times material hereto all books and records covering the Company's Wausau operations were kept in St. Paul; all wages of the Company's employees at Wausau were paid directly from St. Paul; the receipts from the sale of products from the Wausau factory of the Company are commingled with the earnings of the Company's factories in St. Paul, Minnesota, Detroit, Michigan, and Copley, Ohio, and with dividends from companies in which the Company owns a substantial amount of stock and further commingled with earnings from doing business in foreign countries and with earnings from royalties and bonds owned by the Company, including United States govern-[fol. 203] ment bonds. The stock books of the Company are not held within the State of Wisconsin.

At directors' meetings held at the office of the Company in St. Paul, Minnesota, the following dividends were de-

clared payable and were thereafter paid to the common stockholders of the Company, other than payments on treasury stock, on the dates shown below:

Date Paid	Total paid to stockholders
January 2, 1936	$215,209.83
April 1, 1936	216,009.72
July 1, 1936	287,782.00
October 1, 1936	335,863.50
December 22, 1936	624,396.50
March 31, 1937	383,892.00
June 29, 1937	479,865.00
September 29, 1937	575,838.00
December 30, 1937	719,797.50
March 29, 1938	384,504.00
June 28, 1938	384,504.00
September 29, 1938	384,504.00
December 21, 1938	576,656.00
March 30, 1939	480,630.00
June 28, 1939	480,630.00
September 27, 1939	624,819.00
December 20, 1939	720,945.00
March 28, 1940	576,756.00
June 27, 1940	576,756.00
September 29, 1940	576,756.00
December 19, 1940	576,756.00

Said dividends were paid pursuant to Section 34 of the Delaware Corporation Law, which is as follows:

> "The directors of every corporation created under this Chapter, subject to any restrictions contained in its Certificate of Incorporation, shall have power to declare and pay dividends upon the shares of its capital stock either (a) out of its net assets in excess of its capital as computed in accordance with the provisions of Sections 14, 26, 27 and 28 of this Chapter, or (b), in case there shall be no such excess, out of its net profits for the fiscal year then current and/or the preceding fiscal year."

and pursuant to subsequent section which provides:

> "No corporation created under the provisions of this Chapter, nor the Directors thereof, shall pay dividends

upon any shares of the corporation except in accordance with the provisions of this Chapter."

[fol. 204] Minnesota Mining and Manufacturing Company had substantial "net assets in excess of its capital", and pursuant to the Delaware Corporation Law it could not and did not pay its dividends out of Wisconsin income for the previous year or for any year.

The actual payment of said dividends was effected by the executive officers of the Company advising The First Trust Company of St. Paul that a dividend had been declared and remitting to the said The First Trust Company of St. Paul a single check in the aggregate amount of said dividend from the Company's general account which was on deposit in banks located without the State of Wisconsin; that the account out of which said dividends were paid was not an "earnings account" and in said account were assets of the corporation which represented working capital of the corporation, and in some instances, proceeds from the sale of fixed capital. During all of the years in question the gross assets of the Minnesota Mining and Manufacturing Company were far in excess of liabilities and capital. There is no separately identifiable fund out of which dividends are paid, and in fact Minnesota Mining and Manufacturing Company does not have intangible assets sufficient to equal the amount of surplus. Much of the surplus of the corporation, as well as capital of the corporation, is represented by physical assets located in other states.

The First Trust Company of St. Paul made the actual payment to stockholders and issued checks in the respective amounts due for dividends on the respective dates in question, and caused the same to be placed in envelopes addressed to each stockholder at his address, and duly mailed in the United States mails, as the same appeared from the records of the Company upon the date fixed by the Directors of the Company as the date on which dividends would be paid; that no act in connection with the payment of said dividends was performed within the State of Wisconsin, and no act in connection with the receipt of said dividends was performed within the State of Wisconsin, except that a comparatively few stockholders of the [fol. 205] Company reside within the State of Wisconsin and receive their checks by mail; that compliance with the

privilege dividend tax law would require an additional calculation or operation on the part of each employee participating in the determination of the amount of dividends payable to each stockholder of record and in the issuance of checks therefor, and would require the payment of an extra amount to The First Trust Company of St. Paul in making computations and deductions from the dividends so paid, since the deductions of the amount would necessarily increase the work considerably. While it is impossible to itemize the cost of such compliance, it is apparent that considerable expense will be entailed. It is further apparent that if the Minnesota Mining and Manufacturing Company were to deduct the amount of the alleged tax from each of the stockholders to whom payment of a dividend might be made, that it would be impossible by reason of the odd amounts to be deducted from dividends paid to various stockholders to deduct the exact amount of tax due from each dividend paid. Minnesota Mining and Manufacturing Company has not deducted any portion of the alleged tax from dividends paid to its stockholders, by reason of the fact that Minnesota Mining and Manufacturing Company has contended and does contend that the law under which the alleged tax has been levied, as administered by the Wisconsin Tax Commission and the Wisconsin Department of Taxation, is unconstitutional under the Constitution of the State of Wisconsin and the United States Constitution, all for the reasons more particularly hereinafter set forth, and further that the Wisconsin privilege dividend tax law does not apply to the transactions involving the declaration of dividends by appellant involved in this appeal.

[fol. 206] The assessments as modified and confirmed by the Wisconsin Board of Tax Appeals are erroneous, in that it is assumed that the dividends upon which the tax was based were paid out of Wisconsin earnings. This assumption is not based on facts inasmuch as any earnings from Wisconsin had lost their identity in all respects prior to the declaration of the dividend. Further, the dividend policy of the Company had no direct relationship of any kind or nature to Wisconsin earnings, and in attempting to determine the percent of dividend declared and paid out of income derived from property located and business transacted in Wisconsin the Department has assumed, without sufficient facts for such assumption, that such divi-

dends are declared partly out of Wisconsin earnings, when in fact they were declared out of "net assets of the corporation in excess of its capital" which had acquired a situs outside of the State of Wisconsin for a time substantially prior to the date of declaration of the dividends in question.

Introduced at the hearing before the Board of Tax Appeals was a statement of appellant's assets and liabilities in use at its Wausau, Wisconsin, operations for all years in question (Exhibit 15), which is referred to herein by way of reference. From this statement it is apparent that it would be impossible for the appellant to declare and pay dividends out of Wisconsin earnings, the reason being that all earnings since the inception of Wisconsin business in 1930 have been used to purchase real estate, buildings, machinery and inventories in connection with the Wausau plant (the only operation in Wisconsin) and that it has been necessary for the corporation from time to time to advance money from its principal office at St. Paul to help finance the building program of the Wisconsin branch of the business, and that accordingly no dividends have been paid out of Wisconsin earnings.

[fol. 207] That in the computation of the various assessments as confirmed by the Board of Tax Appeals it is assumed that all payments of dividends made in any calendar year are in fact made from surplus as of December 31st of the prior calendar year; that such is not the fact, but that payments are hereinbefore set forth were made pursuant to the Delaware law; that accordingly the assessments from which this appeal is taken are based upon certain arbitrary presumptions not in accordance with the facts and not contemplated by the privilege dividend tax law; that the assessments are erroneous because the theory in computing the assessments has assumed that the dividends were paid out of surplus and that there were Wisconsin earnings in surplus. Such assumption is contrary to the facts because under the Delaware Corporation Law dividends are paid out of its "net assets in excess of capital". There is, however, no segregation of such assets; all assets are mingled and not separately identified as capital or surplus or sums allocated to the payment of indebtedness. Furthermore, it is impossible to identify Wisconsin earnings. Such earnings can not

retain their Wisconsin connection after obtaining situs elsewhere. Wisconsin earnings as such do not enter into dividends declared and paid by the appellant. There are no further presumptions in the Wisconsin privilege dividend tax law other than the presumption that the dividends are paid out of earnings of the prior year, which presumption in the instant assessments has been specifically rebutted, there being no further presumption other than that rebutted and there being no other statutory formula by which the portion, if any, of any dividend allocable to Wisconsin can be ascertained, no tax can be levied unless the dividend allocable to Wisconsin income (if any) can actually be traced and segregated. *J. C. Penney Co -v- Wis. Tax Comm.*, 238 Wis. 69; *Dravo Contracting Co. -v- James*, 114 Fed. (2d) 242, and cases there cited; that it is impossible to trace Wisconsin earnings of income [fol. 208] as such into the dividends in question, and since no method of apportionment of dividends between taxable and non-taxable part is provided by the statute and a physical separation is not possible, the State of Wisconsin is without power to levy any tax whatsoever. Apportionment being a legislative function is not one which the Department of Taxation or the Board of Tax Appeals or the courts may exercise in the absence of statutory provisions. Accordingly, there is no basis for any imposition of any tax of any kind or nature upon the appellant.

In the computation of the tax as confirmed, as hereinbefore stated, it is assumed that the dividends were paid from a fund existing at the end of the calendar year prior to their declaration, rather than that existed at the date of declaration or payment of the dividends in question; that such assumption so made in computing the assessments is not in accordance with the facts.

That the Minnesota Mining and Manufacturing Company made full disclosure of all income received by it, and full disclosure of all dividends paid by it since the passage of the privilege dividend tax law.

Propositions of Law Relied upon by Appellant

(1) That by reason of the facts above stated the transaction upon which the privilege dividend tax is attempted to be imposed in respect to the Minnesota Mining and

Manufacturing Company are wholly outside the jurisdiction of the State of Wisconsin, with the exception of the transfer of the dividends by the Company to certain of its stockholders residing in Wisconsin, in which case the transaction takes place partly within and partly without the jurisdiction of said State. To the extent that the privilege dividend tax is attempted to be imposed on transactions wholly outside of the jurisdiction of the State, it [fol. 209] is unconstitutional and void and in violation of the rights of the Minnesota Mining and Manufacturing Company and of its stockholders residing outside the state, under Article I, Sections 1 and 9 of the Wisconsin Constitution and under the Fourteenth Amendment of the Constitution of the United States.

(2) That the aforesaid privilege dividend tax law is unconstitutional and void, and in violation of the rights of the Minnesota Mining and Manufacturing Company and of its stockholders residing outside the State of Wisconsin, under Article I, Sections 1 and 9 of the Constitution of the State of Wisconsin and the Fourteenth Amendment of the Constitution of the United States, in that it deprives them of their liberty and/or property without due process of law, because it imposes upon such non-resident stockholders what is in effect a tax upon the income of such stockholders; although such income is not earned within the State of Wisconsin nor derived from property or business conducted within the State of Wisconsin, and in that it imposes upon the Minnesota Mining and Manufacturing Company a duty of paying and withholding from said stockholders an unconstitutional tax which requires the expenditure of time and money on the part of the Company to compute, pay and withhold the tax.

Although the privilege dividend tax makes the stockholder ultimately liable for the tax, the Company, nevertheless, has legal standing to object to the validity of the law for the reason that, if the aforesaid privilege dividend tax law is unconstitutional, the Company is being subjected to an unconstitutional burden, and further because in practice it is impossible to withhold the exact amount of the tax from each stockholder, and it therefore becomes necessary for the Company to pay a part of the tax out of its general funds.

[fol. 210] (3) That the aforesaid privilege dividend tax law is unconstitutional and void, and in violation of the

rights of the Minnesota Mining and Manufacturing Company and of its stockholders under Article I, Sections 1 and 9 of the Constitution of the State of Wisconsin and the Fourteenth Amendment of the Constitution of the United States, in that it deprives them of property without due process of law by imposing a tax upon the privilege of receiving and paying out dividends, which privilege is not granted by and could not constitutionally be denied by the State of Wisconsin, such privilege being granted by the State of Delaware and exercised pursuant to the laws of said state.

(4) That the aforesaid privilege dividend tax law is unconstitutional and void insofar as it imposes a tax upon dividends which are paid by the Company to stockholders residing outside Wisconsin, because it is in effect a tax upon stock held by such stockholders, or upon the dividend which is a debt of the Company when declared, which are outside the jurisdiction of the State; and such tax, therefore, deprives the Minnesota Mining and Manufacturing Company and its stockholders residing outside the State of Wisconsin of liberty and/or property without due process of law in violation of the provisions of the Constitution of the State of Wisconsin.

(5) That the aforesaid privilege dividend tax law is wholly void for the reason that it is unconstitutional as applied to dividends paid to stockholders residing outside Wisconsin; and to restrict the application of the law to dividends paid by Wisconsin corporations, or dividends paid by foreign corporations to stockholders residing in Wisconsin, would be a denial of equal protection of the law to such corporations and such stockholders and a violation of the Constitution of the United States and the Constitution of the State of Wisconsin. Further, to so restrict [fol. 211] the application of the law would be to impose a tax which the Legislature of the State of Wisconsin did not intend to impose, since notwithstanding the provisions of the Laws of 1935, Chapter 505, Section 4, it is clear that the provisions of the act are based upon a plan to impose a tax which will fall equally upon resident and non-resident stockholders of corporations doing business in Wisconsin, and that to so restrict the act would be to defeat the obvious intention of the Legislature.

(6) That the aforesaid privilege dividend tax law is unconstitutional and void under Article I, Section 10 of the Constitution of the United States and Article I, Section 12 of the Constitution of the State of Wisconsin, because it impairs the obligation of the contract between the stockholders and the Company under the corporate charter and dividend resolutions by which the stockholders received a right to dividends.

(7) That the aforesaid privilege dividend tax law is unconstitutional and void, and in violation of the rights of the Minnesota Mining and Manufacturing Company and of its stockholders residing outside the State of Wisconsin, in that it deprives them of their liberty and/or property without due process of law because it imposes upon such stockholders in effect a tax on income which was earned by the Minnesota Mining and Manufacturing Company without the State of Wisconsin; all in violation of Article I, Sections 1 and 9 of the Wisconsin State Constitution and the Fourteenth Amendment to the Constitution of the United States.

(8) That the aforesaid privilege dividend tax law is unconstitutional and void, and in violation of the rights of the Minnesota Mining and Manufacturing Company and of its stockholders because it imposes in effect a state tax upon federal instrumentalities and the interest derived therefrom, in Article I, Section 8, Par. 2 of the Constitution of the United States.

[fol. 212] (9) That if any jurisdiction exists in favor of the State of Wisconsin to impose any tax upon the transaction of declaring and paying dividends, it exists only with respect to such portion of the dividends as are allocable to Wisconsin earnings, and that the record shows that no Wisconsin earnings constituted any portion of the dividends on which the assessments were made and accordingly the assessing authorities and the Board of Tax Appeals had no right to assess any tax.

(10) That on the basis of the assessments as confirmed by the Board of Tax Appeals the computation of the tax is based upon an alleged surplus analysis as of December 31st of the year preceding the date of the declaration of the dividends; that it is obvious that if there were any Wisconsin earnings contained in the dividends so

declared, that the only date which could be important for the determination of such portion would be the date of the declaration of the dividend rather than December 31st of the year before; that it is admittedly impossible to analyze the surplus account as of the date of declaration of the dividend, and the State of Wisconsin has no right of any kind or nature to impose any tax until it is determined that there are Wisconsin earnings in any dividend declared and until there is determined the amount of Wisconsin earnings in any such dividend, and this it is impossible so to do. Accordingly, the method of computation used by the assessing authorities as confirmed by the Board of Tax Appeals is wholly erroneous, and the assessments are void.

(11) That in the modified assessments as confirmed by the Board of Tax Appeals in computing the alleged portion of Wisconsin income in surplus the taxing authorities use as a numerator the total alleged Wisconsin income in surplus over total alleged surplus as a denominator, rather than alleged Wisconsin earnings for any particular [fol. 213] year over total surplus. Such a formula is neither contemplated by the act nor is it constitutionally valid. As a result of the use of this formula an attempt is made to levy a tax upon dividends allegedly paid out of earnings derived many years prior to the effective date of the privilege dividend tax law, and the effect of such a formula renders the law as applied unconstitutional under the Fourteenth Amendment of the Constitution of the United States and under Article I, Sections 1 and 9 of the Constitution of the State of Wisconsin, and further void under Article I, Section 12 of the Wisconsin Constitution and Article I, Section 10 of the Constitution of the United States.

(12) That if the assessments as made were contemplated by the law, then and in that event the law is unconstitutional as impairing the obligation of contract between the appellant and the stockholders, in violation of Article I, Section 12 of the Wisconsin Constitution and Article I, Section 10 of the Constitution of the United States, and further would deny the full faith and credit to the laws of the States of Delaware and Minnesota and the corporate charter, by-laws and resolutions of the appellant,

in violation of Article IV, Section 1 of the Constitution of the United States.

(13) That the assessments are invalid because based on presumptions invoked contrary to the facts and without statutory authority, and not authorized by law.

(14) Under Subsection 2 of the Privilege Dividend Tax Law the appellant is required to deduct and withhold the amount of the tax from the dividends payable, and remit the tax so held to the State. The dividends with reference to which the taxes here involved are sought to be imposed were paid several years ago. At the time of their payment there was no standard in existence for the calculation of the tax. At that time the State Tax Commis-[fol. 214] sion insisted that a method of computation be followed, which has since been held incorrect by the Supreme Court of the State of Wisconsin. The appellant obviously was not warranted in computing the tax in an incorrect manner and deducting it. Yet it was given no correct method for making the necessary computation. The time for deduction is now past and the law gives the appellant no authority to deduct the tax from dividends other than those to which it is applicable. Furthermore, the stockholders of the appellant are a changing body. Under the circumstances it is contrary to the statutes itself, as well as unconstitutional both under the State and Federal Constitutions, to penalize appellant as a collecting agent and to hold it liable because it did not collect the tax from the stockholders. If a corporation is impressed as a collecting agent it must be given instructions with reference to collection of the tax which may be reasonably followed, and in the instant case there was complete failure of the law and the Wisconsin Tax Commission to so do.

(14) That the imposition of penalties and interest on the assessments as confirmed are unlawful in view of the fact that it is absolutely impossible, even under the theory adopted by the taxing authorities and as confirmed by the Board of Tax Appeals, to make computation of the tax and payment thereof within the time contemplated by the law. To impose penalties and charge interest under the circumstances violates Article I, Sections 1 and 9 of the Constitution of the State of Wisconsin and the Four-

teenth Amendment of the Constitution of the United States, and is not contemplated by the applicable statutes under the circumstances existing in this case.

(15) Construed as a corporate income tax the privilege dividend tax is unconstitutional under the Wisconsin Constitution for the reasons set forth in the opinion of the [fol. 215] Supreme Court of Wisconsin in *J. C. Penney Co. v. Wis. Tax Comm.*, 238 Wis. 69.

The appellant herein has availed itself of the remedies provided by the statutes of the State of Wisconsin, and particularly Sections 71.12, 71.14 and 71.17.

Minnesota Mining and Manufacturing Company, Appellant. By H. P. Buetow. (Seal.)
John L. Connolly, 791 Forest St., St. Paul, Minn., and Ela, Christianson & Ela, 1 W. Main St., Madison, Wis., Attorneys for Appellant.

[fol. 216] In Circuit Court of Dane County

Minnesota Mining and Manufacturing Company, Appellant,

vs.

Wisconsin Department of Taxation, Respondent

Before Hon. Alvin C. Reis, Judge

Decision—August 14, 1942

By the Court:

This is a dividend tax case, companion to International Harvester Company v. Wisconsin Department of Taxation, decided this date.

Appellant herein raises a further issue. One of its officers testified before the Board of Tax Appeals, there were "no dividends declared out of profits earned in Wisconsin because the earnings were all used to expand the business in Wisconsin."

The appellant's position is expressed at pp. 26-27 of its brief, referring to Exhibit 15 before the tax body:

"This exhibit and the testimony with respect thereto, we submit, conclusively proves that all Wisconsin earnings,

plus additional advances from St. Paul, come back to Wisconsin operations and are represented primarily in capital investments in the form of physical assets. As such obviously these Wisconsin earnings were not and could not be available for the purpose of paying dividends. * * * Exhibit 15 reflects conclusively that in each year since the appellant has been in Wisconsin to and including 1940, the total advancements from St. Paul at all times has substantially exceeded the amount repaid to the home office in St. Paul out of Wisconsin income. In short, Wisconsin income has never been used for the purpose of paying dividends."

[fol. 217] We do not believe that the company's argument is logical. The fact that the company increased its capital investment in Wisconsin, does not destroy the further fact that its Wisconsin income went into the common surplus and increased generally the corporation's dividend potentialities to the extent of that contribution. If it had lost money in Wisconsin, there is nothing to indicate that its capital assets in the state would have been affected. Therefore, the profit realized in Wisconsin places the aggregate corporate surplus just that much ahead.

Upon all other issues, the reasoning and factual background set out in our opinion in the International Harvester case this date are applicable, *mutatis mutandis*, to the situation of Minnesota Mining and Manufacturing Company.

We, of course, can not waive statutory penalties and interest, as the present appellant requests.

The Attorney General may prepare and submit to appellant's attorneys the order and judgment affirming the decision and order of the Board of Tax Appeals.

Dated August 14, 1942.

[fol. 218] IN CIRCUIT COURT OF DANE COUNTY

MINNESOTA MINING & MANUFACTURING COMPANY, Appellant,

vs.

WISCONSIN DEPARTMENT OF TAXATION, Respondent

JUDGMENT—September 2, 1942

The above proceeding commenced by the Minnesota Mining & Manufacturing Company, a Delaware corporation, pursuant to the provisions of sec. 73.015 Wis. Stats. 1941, to review the decision and order of the Wisconsin Board of Tax Appeals dated February 13, 1942 modifying, and affirming as so modified, three additional assessments of the Wisconsin Privilege Dividend Taxes against said Minnesota Mining & Manufacturing Company, one for the year 1936, the second for the year 1937 and the third for the years 1938 to 1940, inclusive, having been heard before the Court on the record made before the Wisconsin Board of Tax Appeals in accordance with the provisions of sec. 73.015 (5) Wis. Stats. 1941, Ela, Christianson & Ela of Madison, Wisconsin by G. Burgess Ela, and John L. Connolly of St. Paul, Minnesota, appearing for the appellant Minnesota Mining & Manufacturing Company and John E. Martin, Attorney General of Wisconsin by Harold H. Persons, Assistant Attorney General appearing for the respondent, and the Court, after hearing the arguments of counsel, reading the briefs submitted, and fully considering the case, having rendered a written opinion dated August 14, 1942, and entered an order directing the entry of judgment affirming the said additional assessments as modified, and affirmed as so modified, by the said decision [fol. 219] and order of the Wisconsin Board of Tax Appeals, and confirming the said decision and order of the Wisconsin Board of Tax Appeals dated February 13, 1942; and

Notice of application for the entry hereof having been duly waived in writing by the attorneys for the appellant Minnesota Mining & Manufacturing Company, on motion of John E. Martin, Attorney General of Wisconsin by Harold H. Persons, Assistant Attorney General,

It Is Hereby Ordered And Adjudged that the three additional assessments of privilege dividend taxes against

the Minnesota Mining & Manufacturing Company, a Delaware corporation, one for the year 1936, the second for the year 1937 and the third for the years 1938 to 1940, inclusive, as modified, and affirmed as so modified, by the decision and order of the Wisconsin Board of Tax Appeals dated February 13, 1942, be and the same are hereby affirmed; and

It Is Hereby Further Ordered And Adjudged that the decision and order of the Wisconsin Board of Tax Appeals, dated February 13, 1942, modifying, and affirming as so modified, the said three additional assessments of privilege dividend taxes against the Minnesota Mining & Manufacturing Company, a Delaware corporation, be and the same hereby is confirmed in all respects; and

It Is Hereby Further Ordered And Adjudged that the respondent, Wisconsin Department of Taxation have and recover of the appellant, Minnesota Mining & Manufacturing Company, a Delaware corporation, the sum of —— Dollars ($——) costs, (Balance of unpaid clerk's fees to be taxed and inserted herein, if not paid by the said [fol. 220] appellant.)

Dated at Madison, Wisconsin this 2 day of September, 1942.

By the Court. (Signed) Alvin C. Reis, Circuit Judge.

Notice of application for the entry of judgment in the above entitled proceeding in the form and content above is hereby expressly waived.

Dated September 2, 1942.

John L. Connolly and Ela, Christianson & Ela, by Ela, Christianson & Ela, Attorneys for Appellant, Minnesota Mining & Manufacturing Company.

[fol. 221] In Supreme Court of Wisconsin

Excerpts from Appellant's Brief

1. Is the Wisconsin Privilege Dividend Tax Law, as applied by the Wisconsin Department of Taxation in making the additional assessments in question against a

foreign corporation on the so-called "surplus analysis" theory, constitutional under the due process and contract clauses of the Wisconsin Constitution and the Federal Constitution, and under Article VIII, Section 1 of Wisconsin Constitution?

The Wisconsin privilege dividend tax as applied by the Department of Taxation in making the assessment in question is unconstitutional under both the State and Federal Constitution. (Article I, Sections 1 and 9, and Article VIII, Section 1, of State Constitution and 14th Amendment to Constitution of United States.)

If any tax can validly be assessed, the tax in the instant case was improperly computed, if the law is construed to permit assessment as made, it is vulnerably retroactive and unconstitutional under the due process clauses of both State and Federal Constitutions.

[fol. 222] IN SUPREME COURT OF WISCONSIN

[Title omitted]

MINUTE ENTRY OF ARGUMENT AND SUBMISSION—March 10, 1943

And now at this day came the parties herein, by their attorneys, and this cause having been argued by John L. Connolly, Esq., and E. Burgess Ela, Esq., for the said appellant, and by Harold H. Persons, Esq., Assistant Attorney General, J. Ward Rector, Esq., Assistant Attorney General, and Richard H. Teschner, Esq., for the said respondent, and submitted, and the court not being now sufficiently advised of and concerning its decision herein, took time to consider of its opinion.

[fols. 223-224] IN SUPREME COURT OF WISCONSIN

Opinion by Justice Wickhem

MINNESOTA MINING AND MANUFACTURING COMPANY, a foreign corporation, Appellant,

vs.

WISCONSIN DEPARTMENT OF TAXATION, Respondent.

JUDGMENT—June 16, 1943

This cause came on to be heard on appeal from the order and judgment of the Circuit Court of Dane County and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this Court, that the order and judgment of the Circuit Court of Dane County, appealed from in this cause, be, and the same are hereby, affirmed.

Justice Barlow took no part.

[fol. 225] IN SUPREME COURT OF WINCONSIN

January, 1943, Term—No. 57

MINNESOTA MINING & MANUFACTURING COMPANY, Appellant,

vs.

WISCONSIN DEPARTMENT OF TAXATION, Respondent.

This is an appeal from an order and judgment of the Circuit Court for Dane County, Alvin C. Reis, Circuit Judge. *Affirmed.*

Appeal to the Circuit Court for Dane County from an order of the Wisconsin Board of Tax Appeals which had affirmed an additional assessment of privilege dividend taxes against appellant, Minnesota Mining & Manufacturing Company, a Delaware corporation. The order of the Wisconsin Board of Tax Appeals was dated February 13, 1942, and the order and judgment of the Circuit Court were made and entered on September 2, 1942. The material facts will be stated in the opinion.

OPINION—Filed June 16, 1943

[fol. 226] WICKHEM, J.:

The facts in this case are not in substantial dispute. Appellant is a Delaware corporation, with its

principal office and place of business in St. Paul, Minnesota. It operates a factory at Wausau, Wisconsin, manufacturing roofing granules. This factory began manufacturing operations in 1930. Sales are made through an office in Chicago but orders are confirmed at the St. Paul office. When products so manufactured are sold, the remittances are made directly to the home office at St. Paul, and the funds from such sales are deposited in the general account of the appellant. Pay rolls, together with pay checks, are prepared at the St. Paul office and drawn on a Wausau bank, and a deposit equaling the amount of the pay roll is forwarded to the Wausau bank to cover the checks at approximately the same time that the checks representing the pay roll are forwarded. The company reports upon a calendar-year basis, closing books as of December 31st, each year. It maintains one general surplus account and none of the earnings from property located or business transacted in Wisconsin are segregated in any way. It maintains no separate balance sheet for Wisconsin operations. Dividends are declared by the board of directors of the company at meetings held in St. Paul; the First Trust Company of that city being the company's transfer agent. All dividends are paid to this transfer agent by check drawn upon a St. Paul bank and distributed to the stockholders by the transfer agent. Dividends are paid from surplus.

Sec. 34, Delaware Corporation Law, empowers corporations to declare and pay dividends either out of net assets in excess of its capital, or out of net profits for the fiscal year then current "and/or" the preceding fiscal year.

In making the assessments the department of taxation analyzed the surplus on December 31st of the year preceding that in which a particular dividend was paid. In this analysis, the department went back to the date on which the corporation commenced doing business in Wisconsin for the purpose of determining, (1) total surplus existing at that time; (2) the ratable contribution of earnings in Wisconsin to the surplus as of December 31st, prior to the declaration of the dividends. The department selected the close of the year preceding the payment of the dividend as the basis of its computations rather than the surplus at the time of the payment or receiving of the dividend, it [fol. 227] being the view of the department that unless the

corporation had closed its books and taken inventory at the time of the payment of the dividend (in which case analysis would have been made as of that time) it would be impossible to revise the surplus as of each dividend-paying date. The dividends were paid out of the corporation's general account. There never was any attempt made to earmark any of the earnings coming from Wisconsin or other states, although the corporation did business in all of the other states of the Union.

Such contentions by appellant as question the constitutionality of the privilege dividend tax as applied by the Department of Taxation are sufficiently answered by the opinion in *International H. Co.* v. *Department of Taxation*, (*ante*, p. 198, 9 N. W. (2nd) 000.) We proceed, therefore, to deal with contentions peculiarly applicable to this case.

Appellant contends that the department has not analyzed the surplus of appellant as of the date of the payment of the dividend. The record shows that dividends were paid on December 7, 1936, December 10, 1937, December 12, 1938, December 21, 1939, and December 10, 1940. The department analyzed appellant's surplus as of December 31, 1935, 1936, 1937, 1938, and 1939, respectively, for the reason that the corporation closed its books and took inventory as of those dates. We see no objection to this method. It is the same basis upon which the dividend was declared, namely, the ascertained surplus of the corporation available for dividends. We are not persuaded that there is anything jurisdictionally or procedurally lacking in a method of computation which follows the ordinary course of business adopted by the corporation itself in voting its dividend. Aside from this, there is a strong inference that dividends are paid out of assets ascertained to be available for this purpose. The normal corporate procedure is to use the last annual inventory and closing of the books to furnish the information, and the dividend is customarily based on the situation thus disclosed. If some accurate method is in use in a particular case to disclose the general corporate situation as of the time of the dividend, it is for the corporation to show this, and if satisfactorily shown, it is proper for the department to use this as a basis for the tax.

It is next contended that no Wisconsin income was used in the payment of dividends, because the record demonstrates that all Wisconsin income was reinvested in physi-

cal assets of the corporation in Wisconsin. This contention misses the point. It seems to us that it can make no possible difference what is done with the particular money earned in Wisconsin so long as the earnings go to swell the total assets of the corporation. To the extent that they do this, and increase the margin of assets over liabilities, including capital, they are a proportional part of the funds available for dividends. None of the Wisconsin earnings are earmarked. According to the record, they are turned in to the home office, and reinvested in physical assets located in Wisconsin. This does not repel the inference that Wisconsin net earnings are a part of the funds out of which dividends are declared and paid.

[fols. 228-229] It is finally contended that even if the assessments are held valid or partially valid, penalties and interest should not be imposed. We find the statutory requirements entirely clear and unambiguous upon this point, and there is no attack upon the validity of the provisions. Hence, we can only paraphrase what was said by this court in *State* v. *Baker*, 232 Wis. 383, 396, 286 N. W. 535, (287 N. W. 690,) that despite the urge to find a way to avoid the imposition of penalties, "We are bound by the clear unambiguous language of the statute and cannot by judicial construction introduce into them provisions and remedies which do not exist." See in this connection *Laabs* v. *Tax Comm.*, 218 Wis. 414, 261 N. W. 404; *State ex rel Crucible S. C. Co.* v. *Wis. Tax Comm.*, 185 Wis. 525, 201 Wis. 764.

By the Court.—Order and judgment affirmed.

Barlow, J., took no part.

[fol. 230] In Supreme Court of Wisconsin

[Title omitted]

Motion for Rehearing—Filed July 3, 1943

Now comes the Minnesota Mining and Manufacturing Company, by Ela, Christianson & Ela, its attorneys, and respectfully moves the Court for a rehearing of the decision and mandate of the court filed herein on the 16th day of June, 1943.

The reasons in support of this motion will be submitted on printed arguments, as provided by the rules of practice of this court.

Dated, July 3rd, 1943.

Ela, Christianson & Ela, Attorneys for Appellant.

[fol. 231] In Supreme Court of Wisconsin

[Title omitted]

Order Retaining Record—July 3, 1943

The said appellant having moved for a rehearing in this cause, it is now here ordered that the record be retained in this Court until the final determination of said motion.

[fols. 232-233] In Supreme Court of Wisconsin

[Title omitted]

Order Denying Motion for Rehearing—September 14, 1943

The Court being now sufficiently advised of and concerning the motion of the said appellant for a rehearing in this cause, it is now here ordered that said motion be, and the same is hereby, denied with $25.00 costs.

[fols. 234-235] In Supreme Court of Wisconsin

[Title omitted]

Opinion on Rehearing—Filed September 14, 1943

Wickhem, J. on re-hearing:

The Court has thoroughly considered the motions for rehearing filed herein and is not disposed to modify its views or to restate or amplify its opinion in any respect but one. In discussing the permissible retroactivity of

the privilege dividend tax and noting an equal division of the court upon that point, the opinion did not indicate whether the difference in view was based upon the constitution of the state of Wisconsin, the constitution of the United States of America, or both. It may be useful to state that the constitutionality of the law in this respect was considered under both; and the court was of the view that the same considerations governed whichever constitution was applied.

By the Court:—Motion for rehearing is denied, with $25 costs.

[fol. 236] SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF PARTS OF THE RECORD TO BE PRINTED—Filed January 21, 1944.

Now Comes the above named appellant pursuant to paragraph 9, rule 13 of the Rules of The Supreme Court and states that the points on which it intends to rely in this court in this case are as follows:

(1) The Supreme Court of Wisconsin erred in failing to hold that Section 3, Chapter 505, Wisconsin Session Laws, 1935, as amended by Chapter 552, Wisconsin Session Laws, 1935, and as extended in operation by Chapter 309, Wisconsin Session Laws, 1937, and Chapter 198 of Wisconsin Session Laws, 1939, as applied to Minnesota Mining & Manufacturing Company and its stockholders under the existing facts was invalid as in conflict to the Fourteenth Amendment to the Constitution of the United States of America as imposing a tax beyond the taxing jurisdiction of the State of Wisconsin.

(2) The Supreme Court of Wisconsin erred in failing to hold that the assessments of taxes involved in this proceeding pursuant to the provisions of Section 3, Chapter 505, Wisconsin Session Laws, 1935, as amended by Chapter 552, Wisconsin Session Laws, 1935 and as extended in operation by Chapter 309, Wisconsin Session Laws, 1937 and Chapter 198 of Wisconsin Session Laws, 1939, against the Minnesota Mining & Manufacturing Company, [fol. 237] a Delaware corporation, under the existing facts,

constituted a deprivation of property of Minnesota Mining & Manufacturing Company and its stockholders without due process of law and beyond the taxing power of the State of Wisconsin and therefore invalid as violative to the Fourteenth Amendment to the Constitution of the United States of America.

(3) The Supreme Court of Wisconsin erred in failing to hold (split decision of State Supreme Court three to three which by rule of Wisconsin Supreme Court affirmed the trial court's decision) that Section 3, Chapter 505, Wisconsin Session Laws, 1935, (as amended by Chapter 552, Wisconsin Session Laws, 1935), and as extended in operation by Chapter 309, Wisconsin Session Laws, 1937, and Chapter 198 of Wisconsin Session Laws, 1939, so far as it purports to reach Wisconsin earnings of Minnesota Mining & Manufacturing Company without reference to the year in which they were earned, and for many years prior to the enactment of the law and from the time the corporation first operated in Wisconsin, are invalid as depriving the Minnesota Mining & Manufacturing Company and its stockholders of property without due process of law and therefore to this extent invalid as violative of the Fourteenth Amendment to the Constitution of the United States.

The appellant further states that the following parts of the record as filed in this court need be printed by the clerk for the hearing of the case:

Title of paper	*Record page*
Order Denying Motion for Rehearing	232
Opinion on Rehearing, Wisconsin Supreme Court	233-234

Respectfully submitted, John L. Connolly, G. Burgess Ela, Counsel for Appellant.

Service of the foregoing statement and designation is hereby admitted this 15 day of January, 1944.

John H. Martin, Attorney General for the State of Wisconsin, Ward Rector, Deputy Attorney General for the State of Wisconsin, Harold H. Persons, Assistant Attorney General for the State of Wisconsin, Attorneys for Appellee. By Harold H. Persons, Assistant Attorney General.

[fol. 240] SUPREME COURT OF THE UNITED STATES

ORDER NOTING PROBABLE JURISDICTION—February 28, 1944

The statement of jurisdiction in this case having been submitted and considered by the Court, a probable jurisdiction is noted.

Endorsed on Cover: File No. 48,114. Wisconsin Supreme Court, Term No. 621. Minnesota Mining and Manufacturing Company, Appellant, vs. Wisconisn Department of Taxation. Filed January 21, 1944. Term No. 621 O.T. 1943.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 621

MINNESOTA MINING AND MANUFACTURING COMPANY,

Appellant,

vs.

WISCONSIN DEPARTMENT OF TAXATION.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN.

STATEMENT AS TO JURISDICTION.

JOHN L. COFFOLLY,
G. BURGESS ELA,
Counsel for Appellant.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 621

MINNESOTA MINING AND MANUFACTURING COMPANY,

Appellant,

vs.

WISCONSIN DEPARTMENT OF TAXATION.

Appellee.

STATEMENT AS TO JURISDICTION.

Pursuant to the provisions of Rule 12 of the Rules of the Supreme Court of the United States, the above-named appellant files this, its separate statement particularly disclosing the basis on which it is contended the Supreme Court has jurisdiction upon the appeal to review the judgment appealed from herein.

The appellant, in support of the jurisdiction of this Court to review the above-entitled cause on appeal, respectfully represents:

(a) Basis On Which It Is Contended That United States Supreme Court Has Jurisdiction.

The case is one in which the validity of a statute of the State of Wisconsin as applied in assessing certain taxes against the appellant, was drawn in question, upon the

ground that the statute as applied is repugnant to the due process clause of the Fourteenth Amendment of the Constitution of the United States. The final decision in the Supreme Court of the State of Wisconsin, the Court of last resort in that State, is in favor of the validity of the statute as applied. Therefore, in accordance with the rules of the Supreme Court of the United States (Rule 46, Par. 2) the case is one in which under the legislation in force when the Act of January 31, 1928 (45 Stats. L. 541) was passed, to-wit, under Section 237 (a) of the Judicial Code (28 U. S. C. A. Section 344) a review could be had in the Supreme Court of the United States on writ of error as a matter of right.

(b) The Statutory Provisions Sustaining Jurisdiction.

The statute supporting jurisdiction in this case is Section 237 (a) of the Federal Judicial Code (28 U. S. C. A. Section 344 (a)) which provides:

> "A final judgment or decree in any suit in the highest court of a state in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of the United States, and the decision is against its validity; or *where is drawn in question the validity of a statute of any state, on the ground of its being repugnant to the Constitution*, treaties, or laws *of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error.*" (Italics ours.)

Petitioner also relies on Rule 46 of the Rules of the United States Supreme Court and particularly on Paragraph 2 thereof which provides in part:

> "Under the act of January 31, 1928, as amended by the act of April 26, 1928, the review which theretofore could be had in this Court on writ of error may now be obtained on an appeal. * * *"

(c) The Statutes and Laws of the State of Wisconsin, the Validity of Which Is Involved.

The statutes and laws of the State of Wisconsin as construed and applied in this case, which are involved, are as follows: Section 3, Chapter 505, Laws of Wisconsin, 1935, effective on its publication on September 26, 1935, and as amended by Chapter 552, Laws of Wisconsin, 1935, effective on its publication on October 8, 1935, provide:

"Section 3. Privilege Dividend Tax. (1) For the privilege of declaring and receiving dividends, out of income derived from property located and business transacted in this state, there is hereby imposed a tax equal to two and one-half per centum of the amount of such dividends declared and paid by all corporations (foreign and local) after the passage and publication of this act and prior to July 1, 1937. Such tax shall be deducted and withheld from such dividends payable to residents and nonresidents by the payor corporation.

(2) Every corporation required to deduct and withhold any tax under this section shall, on or before the last day of the month following the payment of the dividend, make return thereof and pay the tax to the tax commission, reporting such tax on the forms to be prescribed by the tax commission.

(3) Every such corporation hereby made liable for such tax, shall deduct the amount of such tax from the dividends so declared.

(4) In the case of corporations doing business within and without the state of Wisconsin, such tax shall apply only to dividends declared and paid out of income derived from business transacted and property located within in the state of Wisconsin. The amount of income attributable to this state shall be computed in accordance with the provisions of chapter 71. In the absence of proof to the contrary such dividends shall be

presumed to have been paid out of earnings of such corporation attributable to Wisconsin under the provisions of chapter 71, for the year immediately preceding the payment of such dividend. If a corporation had a loss for the year prior to the payment of the dividend, the tax commission shall upon application, determine the portion of such dividend paid out of corporate surplus and undivided profits derived from business transacted and property located within the state.

(5) Dividends paid by a subsidiary corporation to its parent shall not be subject to the tax herein imposed provided that the subsidiary and its parent report their income for taxation under the provisions of chapter 71 on a consolidated income return basis, or both corporations report separately.

(6) The provisions of this section shall not apply to dividends declared and paid by a Wisconsin corporation out of its income which it has reported for taxation under the provisions of chapter 71, to the extent that the business of such corporation consists in the receipt of dividends from which a privilege dividend tax has been deducted, and withheld and the distribution thereof to its stockholders.

(7) For the purposes of this section dividends shall be defined as in section 71.02, except that the tax herein imposed shall not apply to stock dividend or liquidating dividends.

(8) The tax hereby levied, if not paid within the time herein provided, shall become delinquent and when delinquent shall be subject to a penalty of two per cent on the amount of the tax and interest at the rate of one-half per cent per month until paid.

(9) The tax hereby imposed shall, when collected by the tax commission, be paid by it into the state treasury."

The above legislation was extended in operation by Chapter 309 of the Session Laws of Wisconsin of 1937 to July 1st,

1939, and by Chapter 198 of the Session Laws of 1939 to July 1st, 1941, further by Chapter 198 of the Session Laws of 1939, the rate was increased from two and one-half per cent (2½%) to three per cent (3%). Chapter 223, Session Laws of 1937, also slightly amended the law, but such amendment has no bearing on the controversy here involved.

(d) Date of Judgment To Be Reviewed and Date of Application For Appeal.

The date of the judgment and decision of the Supreme Court of Wisconsin sought to be reviewed is June 16, 1943, as modified and supplemented by decision and judgment denying petition for rehearing by the Wisconsin Supreme Court on September 14, 1943. The date upon which the application for appeal to United States Supreme Court is presented is December 11th, 1943.

(e) Nature of the Case and Rulings of the Court Bringing the Case Within the Jurisdictional Provisions Relied Upon.

The case involves the validity of certain assessments made against the appellant, Minnesota Mining & Manufacturing Company, a Delaware corporation, for so-called Wisconsin privilege dividend taxes pursuant to Section 3 of Chapter 505 of the Laws of 1935 as amended and as extended by Chapter 309, Session Laws of 1937, and Chapter 198, Session Laws of 1939.

The controversy at issue arose out of three separate assessments of so-called Wisconsin privilege dividend taxes under the laws above set forth.

In substance this law attempts to impose a tax of two and one-half per cent (2½%) (three per cent (3%) after July 1, 1939) on the amount of dividends declared and paid

by corporations, domestic and foreign, out of income derived from property located and business transacted in the state of Wisconsin. The law specifically provides that such tax shall be deducted and withheld from such dividends payable to resident and nonresident stockholders by the payor corporation. The corporation declaring the dividend is also made liable for the tax, but is required to deduct it from the dividends payable to the stockholders.

The basic facts in connection with the assessments are not in dispute. The appellant is a Delaware corporation with its principal office and place of business in St. Paul, Minnesota. Its only operations in Wisconsin is in connection with a factory at Wausau, Wisconsin, where it manufactures roofing granules It commenced actual operations in Wisconsin in 1930 and was duly qualified as a foreign corporation. Sales are made of the products from the Wisconsin operations through a sales office in Chicago, Illinois. All of these orders are confirmed at the St. Paul office and shipping instructions forwarded from the St. Paul office (R. 186). When products so manufactured are sold, the remittances are made directly to the home office at St. Paul and funds from such sales are deposited in the bank account of the appellant.. Pay rolls are prepared in St. Paul and are drawn on a Wausau, Wisconsin, bank and a deposit equalling the amount of the pay roll is forwarded to the Wausau, Wisconsin, bank from St. Paul to cover the checks approximately at the time the checks representing the pay roll are forwarded (R. 187). The appellant, as a foreign corporation, reports such income as is taxable to the state of Wisconsin for income tax purposes on a calendar year basis (R. 128). All dividends upon which the attempt to tax involved in this controversy were levied were declared by the board of directors of the company at meetings held at St. Paul, Minnesota. The transfer agent for shares of stock is the First Trust Com-

pany of St. Paul, Minnesota (R. 108, 186). Dividends paid by the appellant during the whole period involved in controversy on this appeal were paid to the transfer agent in St. Paul by check drawn on the St. Paul bank, and distributed by such bank through the mails to company stockholders by the transfer agent; no stockholders' meetings or directors' meetings have ever been held in the state of Wisconsin (R. 186). Only a small percentage of the outstanding stock of the appellant is owned by Wisconsin residents. The records show that dividends are not paid out of the earnings of the company for the year immediately preceding the payment of the dividend, but are rather paid out of the general funds of the corporation. The dividends in question were paid pursuant to Section 34 of the Delaware Corporation Law, which provides as follows:

> "The directors of every corporation created under this Chapter, subject to any restrictions contained in its Certificate of Incorporation, shall have power to declare and pay dividends upon the shares of its capital stock either (a) out of its net assets in excess of its capital as computed in accordance with the provisions of Section 14, 26, 27 and 28 of this Chapter, or (b), in case there shall be no such excess, out of its net profits for the fiscal year then current and/or the preceding fiscal year" (R. 193).

The dividends in question were paid out of the surplus of the company (R. 188).

Many stockholders in the company have only a small number of shares of stock and on the basis of the assessments as made a tax cannot be computed and withheld from the small stockholders in the exact amount thereof because the amount of tax would be a fractional amount of a cent (R. 118, 119). In making the assessments in question the Wisconsin Department of Taxation attempted to analyze the total surplus of the corporation on December 31st of the

year preceding the year in which a particular dividend was paid, to ascertain how much Wisconsin income was in the surplus. In such alleged analysis, the Department analyzed surplus back to the date on which the corporation first commenced doing business in Wisconsin attempting to determine the total surplus at that time and then attempting to analyze from year to year the ratable contributions of earnings in Wisconsin to the surplus as of December 31st prior to the declaration of the dividend. It then determined the percentage of Wisconsin earnings in surplus to aggregate surplus and applied a fraction resulting from this ratio to total dividends paid by the corporation and taxed that portion of the dividend so allocated to Wisconsin. The stock records of the company are maintained in Minnesota and Delaware and not in Wisconsin. The surplus of the company at the end of various years was invested in accounts, inventory, fixed assets, such as lands, buildings, machinery and equipment located in various states, and in cash (R. 121-123).

The Wisconsin Department of Taxation purporting to act under the Wisconsin privilege dividend tax law levied three separate additional assessments against the appellant as follows:

Dividends paid in the calendar year of 1936	$2,220.60
Dividends paid in the calendar year of 1937	$3,037.75
Dividends paid in the calendar years of 1938, 1939, and 1940	$9,307.08

Appropriate claims for abatement were filed with the Department of Taxation and denied. Thereafter, as provided by the laws of Wisconsin, the appellant petitioned the Wisconsin Board of Tax Appeals for review of assessments and reversal thereof. The matters were consolidated for hearing and a single record made up before the Board of Tax Appeals which affirmed the assessments so

made, with modification of certain assessments not material to the controversy in its present stage.

The appellant then appealed said determination of the Board of Tax Appeals to the Circuit Court for Dane County, Wisconsin, and that court affirmed the decision and order of the Board of Tax Appeals.

The appellant appealed from this decision and judgment of the Circuit Court for Dane County to the Supreme Court for the State of Wisconsin, the court of last resort in Wisconsin, and it affirmed the judgment so delivered. On the issue of whether a portion of the law was unconstitutional under the Fourteenth Amendment of the Constitution of the United States as being vulnerably retroactive and as such taking the property of the appellant and its stockholders without due process of law, the Supreme Court of the State of Wisconsin was evenly divided—three justices being of the opinion that the law was unconstitutional to the extent that it imposed a vulnerably retroactive tax, the other three justices being of the opinion that the law was constitutional in this respect.

Throughout all of these proceedings, the appellant has challenged the validity of the law as applied to dividends paid by it and particularly has it challenged the law and the tax assessments thereunder as applied to dividends paid by it on the ground that it takes its property and the property of the stockholders of the appellant without due process of law and in contravention to the Fourteenth Amendment of the United States because it imposes a tax beyond the taxing jurisdiction of the state of Wisconsin.

Appellant also throughout the proceedings has further challenged the validity of the law as applied to it and its stockholders so far as it purports to reach the alleged Wisconsin income purportedly included in the payment of the dividend *regardless of when earned*, it being contended that in any event to the extent that the law and the purported

tax attempts to reach so-called Wisconsin income in surplus for many years prior to the enactment of the law in 1935, that such law and tax takes the property of the appellant and its stockholders without due process of law and in contravention of the Fourteenth Amendment of the United States.

The Wisconsin Supreme Court in its decision in the instant case specifically ruled upon the constitutional questions so raised by the appellant, but denied it the relief prayed for although as hereinbefore pointed out on the constitutional retroactivity phase of the matter, the Wisconsin Supreme Court was evenly divided. In its decision on motion for rehearing the Wisconsin Supreme Court unqualifiably ruled that the difference of conclusion on the retroactivity phase of the matter raised by the two divisions of the Court was based upon both the United States Constitution and the Constitution of the State of Wisconsin.

It should be noted at this point that certain phases of the Wisconsin privilege dividend tax law have heretofore been before this Court in the cases of *State of Wisconsin* v. *J. C. Penney Co.*, 311 U. S. 435, 61 Sup. Ct. 246; *State of Wisconsin* v. *Minnesota Mining & Manufacturing Co.*, 311 U. S. 452, 61 Sup. Ct. 253; and *State of Wisconsin* v. *F. W. Woolworth Co.*, 311 U. S. 622, 61 Sup. Ct. 395.

Those cases involved a review of a determination of the Supreme Court of the State of Wisconsin which found the Wisconsin privilege dividend tax law as applied to foreign corporations unconstitutional under the Fourteenth Amendment of the Constitution of the United States. This Court by a five (5) to four (4) decision—Chief Justice Hughes, Mr. Justice McReynolds, Mr. Justice Roberts and Mr. Justice Reed, dissenting—reversed the Wisconsin Supreme Court, the majority of the Court speaking through Mr. Justice Frankfurter, holding that the practical operation of the law and tax was to impose an additional income

tax on corporate income when paid out, and holding that the fact that the Wisconsin Supreme Court had "labeled" the law a tax on the privilege of declaring dividends rather than as a supplementary income tax on the corporation did not vitiate the tax, and that Wisconsin had the power to levy such a supplementary income tax on the corporation because it had given protection to the earning of the income (*State of Wisconsin* v. *J. C. Penney Co.*, 311 U. S. 435 at 444). The dissenting division of the Court, however, challenged the construction of the law given in the majority opinion and insisted that the tax was strictly an excise tax and that the tax was a tax against stockholders and as such was clearly invalid under the Fourteenth Amendment to the Constitution of the United States as to a foreign corporation. It is apparent from a reading of the decision, that the majority opinion assumed that if the tax was a tax against the stockholder it could not be sustained.

The taxes involved in the litigation heretofore before this Court had been assessed against the corporations, by the application of a statutory presumption that dividends of a foreign corporation were presumed to have been paid out of earnings of the company attributable to Wisconsin under the general income tax statute for the year immediately preceding the declaration of the dividend in the absence of proof to the contrary. (See Section 4 of Section 3, Chapter 505, Laws of 1935.) This Court in the *J. C. Penney Company* case, *Minnesota Mining and Manufacturing Company* case, and *F. W. Woolworth Company* case remanded the cases to the Supreme Court of Wisconsin for the determination of such questions as were open in light of the opinion so rendered by this Court (*State of Wisconsin* v. *J. C. Penney Co.*, 311 U. S. 435, 446).

The Wisconsin Supreme Court on remand (*J. C. Penney Co.* v. *Tax Commission* and companion cases, 238 Wis. 69) held and determined that the statutory presumption on which the taxes were assessed in those cases had been

erroneously applied because all of the litigants had paid the dividends out of surplus and this circumstance rebutted the statutory presumption that the dividends were paid out of prior years' earnings. The Wisconsin Supreme Court accordingly remanded the litigation to the Tax Commissioner for further computation of the tax.

On remand the Wisconsin Supreme Court vehemently denied that the tax was an income tax on the corporation as indicated by the majority decision of this Court in the *Penney* case and postulated that if it was an income tax, it was an income tax on the stockholder and as to a non-resident stockholder, void under the Wisconsin constitution.

The tax against the Minnesota Mining & Manufacturing Company involved in the prior litigation involved only a tax on the dividends paid by that company in the calendar year of 1936, and the tax for that year has now been computed on an entirely different basis (so-called surplus analysis basis, instead of statutory presumption basis as originally).

Because on remand, the Wisconsin Supreme Court reversed its decision with directions to remand each case to the Tax Commissioner because of incorrect computation, the taxpayer litigants there involved, inasmuch as such determination was not *final*, had no right or opportunity to appeal from the decision of the Court on remand to this Court to urge that Mr. Justice Frankfurter's construction of the law was clearly erroneous, and inasmuch as the decision on the Federal Constitutional question was predicated solely on a construction of the law as a supplementary corporate income tax, that a different result should be reached.

It is clear, however, that on the decision on remand, the Supreme Court of Wisconsin by its construction of the law removed the basis on which the United States Supreme Court upheld the law and tax in the *Penney* case, by denying a construction to the law which made it an income tax against the corporation.

In short, a basic conflict in the construction of the law existed between that given it by the majority of this Court speaking through Mr. Justice Frankfurter, and that given it in the dissenting opinion of this Court, and by the Wisconsin Supreme Court on remand.

A comparison of the language in the majority opinion of this Court and of the dissenting opinion of this Court and of the language of Mr. Chief Justice Rosenberry on remand illustrates clearly and graphically this basic conflict of construction.

Frankfurter's Opinion.	*Roberts' Dissent.*	*Chief Justice Rosenberry's Opinion.*
(61 S. Ct. 248)—	(61 S. Ct. 251)—	(238 Wis. 69 at 73)—
"The practical operation of this legislation is to impose an additional tax on corporate earnings within Wisconsin but to postpone the liability for this tax until such earnings are paid out in dividends."	"It is said that the challenged exaction is merely an additional income tax—this notwithstanding that the tax is not called an income tax, has been held by the highest court of Wisconsin not to be an income tax but an excise upon a privilege. * * *"	"In no sense and to no extent whatever is it a tax upon the income of the corporation."
		(238 Wis. 69 at 73)—
		"There is no provision in the Wisconsin statute for taxing disbursements as income. The income of the corporation was taxed by the state when it was received. If the State sought to tax the corporate income at a higher rate, all that it was required to do was to increase the rate."
(P. 249)—	(P. 252)—	
"* * * *but the privilege dividend tax of 1935 superimposed upon this income tax a tax upon corporate income that is paid out.*	"By the very terms of the Act the tax is laid not on the corporation, but on the stockholders receiving the dividend, and, by confession, thousands of stockholders are not residents of Wisconsin."	
"The case thus reduces itself to the inquiry whether Wisconsin has transgressed its taxing power because the Supreme Court has described the practical result of the exertion of that power by one formula rather than another—has labeled it a tax on the privilege of declaring dividends *rather than a supplementary income tax.*"	(P. 252)—	(238 Wis. 69 at 72)—
	"We *are now told that* this is not a fair exposition of the law, but that on the contrary and in the teeth of the known facts *what Wisconsin did was to lay a supplementary income tax upon foreign corporations.*"	"If there has been a shifting of labels in this case, it was not done by this court. It is perfectly true that the tax cannot be sustained as an income tax."

The Supreme Court of the State of Wisconsin in a later series of decisions which will be referred to in a later portion of this statement has by its construction of the law now specifically determined the tax as a tax on the stockholder and not on the corporation, and has thus definitely removed the basis upon which this Court sustained the constitutionality of the law in the *Penney* case.

So, also, have the Federal Courts been placed in an "immaculate dilemma" as a result of this conflict in construction in matters involving the right of a corporation to deduct dividend taxes paid by them from gross income for the purpose of determining net income for Federal income tax purposes. There is a conflict in the decisions in the Federal Courts as a result. These decisions will be referred to on the question of the existence of a substantial federal question. The basis upon which this Court sustained Wisconsin's jurisdiction to tax having now been wholly removed, there is no longer any foundation for the result reached in its decision in the case of *State of Wisconsin* v. *J. C. Penney Co.* (311 U. S. 435, 61 Sup. Ct. 246) and *State of Wisconsin* v. *Minnesota Mining & Manufacturing Company* (311 U. S. 462, 61 Sup. Ct. 253).

(f) Grounds Upon Which It Is Contended the Questions Involved Are Substantial.

As hereinbefore stated, there are two major federal constitutional questions raised by the assignments of error and both present *substantial* federal questions:

First, whether the law as now finally construed by the Wisconsin Supreme Court imposes a tax upon transactions and events and on subjects outside of Wisconsin's jurisdiction to tax, and as such deprives the Minnesota Mining & Manufacturing Company and its stockholders of property without due process of law and in contravention to

the Fourteenth Amendment of the Constitution of the United States.

Secondly, whether the law as now construed and applied by the Wisconsin Supreme Court is vulnerably retroactive and as such deprives the Minnesota Mining & Manufacturing Company and its stockholders of property without due process of law to the extent of the application of the vulnerably retroactive phase of the law.

(a) *A substantial federal question is involved as to Wisconsin's jurisdiction to tax, in view of the construction of the law now given by the Wisconsin Supreme Court.*

There can be little question but what in view of the construction of the law now given by the Supreme Court of the State of Wisconsin, that a substantial federal question is presented as to the right of Wisconsin to levy a tax on the transactions of a foreign corporation declaring and paying a dividend outside of the State of Wisconsin. The decisions in the cases of *State of Wisconsin* v. *J. C. Penney Co.*, 311 U. S. 435, 61 Sup. Ct. 246, and *State of Wisconsin* v. *Minnesota Mining & Manufacturing Co.*, 311 U. S. 452, 61 Sup. Ct. 253, in no way negative the existence of a substantial federal question in the instant case. This Court, as has heretofore been pointed out in a five (5) to four (4) decision, sustained the constitutionality of the law solely on a construction that the law was a supplementary income tax on the corporation. In those cases, this Court by majority decision held that the law, *as so construed*, did not violate the Fourteenth Amendment to the Constitution of the United States.

The dissenting opinion by Mr. Justice Roberts, in which three other justices concurred, was based on the conclusion that the tax was not a supplementary corporate income tax against the corporation but rather a transaction tax

on the stockholder and as such obviously invalid. The majority opinion made no attempt whatsoever to sustain the law and tax involved as a tax against a stockholder.

The majority opinion in the *Penney* case held that the descriptive "pigeon-hole" into which the state court puts a tax is of no moment in determining the constitutional significance of the exaction. If justification for the construction given the law in the majority opinion in the *Penney* case can be found, it is solely on the ground that the Wisconsin Supreme Court at that time had not determined the incidence of the tax, merely holding that the tax as a transaction tax, was unconstitutional. This Court further held in the *Penney* case that it was not bound by the *characterization* which a state court gives to a tax. However, the Wisconsin Supreme Court has now construed the privilege dividend tax act and has unequivocally determined that the incidence of the tax is upon the stockholder and not on the corporation. *This is a question not of characterization but of construction.* Mr. Justice Roberts' dissenting opinion was directed entirely to the unconstitutionality of the law and tax as a tax upon a stockholder, and Mr. Justice Frankfurter's majority opinion did not dispute this proposition, but held that it was constitutional as a supplementary income tax upon the corporation, which construction is no longer possible in view of the more recent decisions of the Supreme Court of the State of Wisconsin *construing* the law.

The Circuit Court for Dane County, Wisconsin, Honorable Alvin C. Reis, Circuit Judge presiding, in the instant case has succinctly and forcefully and accurately analyzed the basic conflict herein in the case of *International Harvester Co. v. Wisconsin Department of Taxation*, a companion case. The opinion in that case was adopted by way of reference by the trial court to apply in the instant case

and a copy is attached to this statement. Judge Reis there said:

"We agree with counsel for the International Harvester Company that an immaculate dilemma has been created.

In the first Penney case the Supreme Court held the tax to be a transaction tax or tax on "privilege", as in terms it so states; and since the transaction happened and the privilege was exercised outside of Wisconsin, in the case of a foreign corporation such as this one; the Wisconsin court held the tax unconstitutional, being violative of due process.

When however this case reached the Supreme Court of the United States, that tribunal regarded this tax as a "supplementary income tax" upon the corporation and hence clearly within the power of the state to impose and not infringing upon the fourteenth amendment.

In the third and final round of the battle thus far, i. e., remand from the United States Supreme Court to the Wisconsin court, our local court followed the United States Supreme Court upon the issue of constitutionality *because it had to do so.* That pithes a delicate point rather abruptly but no one will question the accuracy of our assertion.

The Supreme Court of Wisconsin however, in this last decision, refused to recede from its former position that this was an excise or privilege tax. It militantly maintained that it was its right, and its alone, to say what this tax was; and that such was not the province of the Supreme Court of the United States. And thereupon and in the face of the highest federal court declaration that the tax here involved was a "supplementary income tax" upon the corporation, the Wisconsin court unequivocally declared: "*In no sense and to no extent whatever, is it a tax upon the income of the corporation.*" (Our italics.)

J. C. Penney Company vs. *Tax Commission*, 238 Wis. 69, 73.

We can not settle this dispute. That rests far beyond our hands.

The Wisconsin court insists that the tax is a transaction tax, which under the Federal constitution makes it unconstitutional because based on out-of-state transactions. But the United States court majority opinion disregards it as a transaction tax and sets the tax up as an additional corporate income tax, the validity of which is obvious.

The Supreme Court of Wisconsin, as noted, however, will not accept it as an income tax on the corporation. Furthermore, it postulates that if it is an income tax on individuals, it is unconstitutional *under the state constitution*, because the individuals are beyond the jurisdiction of Wisconsin to tax.

"It is perfectly true that the tax cannot be sustained as an income tax under the law of this state."—Thus spoke our own Supreme Court.

> *J. C. Penney Company* vs. *Tax Commission*, 238 Wis. 69, 72.

Therefore, as an income levy, the tax is completely *persona non grata* in this state,—an unwanted black sheep in the Wisconsin court's backyard.

Here then is the deadlock: If the tax is a transaction tax, as Wisconsin's court says it is, then it is void under the *Federal* constitution; and the federal court should so hold it. If on the other hand it is an income tax, it can be an income tax only on individuals, according to the Wisconsin court, and then it becomes void under the state constitution; and the state court should so hold it."

This accurate observation of the trial court is emphasized by a series of subsequent decisions both in the Supreme Court of Wisconsin and in the Federal Courts. The Supreme Court of Wisconsin in the case of *Wisconsin Gas & Electric Company* v. *Department of Taxation*, 243 Wis. 216, 10 N.W. (2d) 140, decided June 16, 1943, held that for Wisconsin income tax purposes a corpora-

tion could not deduct from gross income the privilege dividend tax paid by the corporation for the purpose of determining net taxable income under the Wisconsin income tax law, because the tax was held to be a tax upon the stockholder and not upon the corporation.

The Supreme Court of the State of Wisconsin further in the case of *Blied* v. *Wisconsin Foundry & Machine Company*, 243 Wis. 221, 10 N. W. (2d) 142, decided June 16, 1943, denied a preferred stockholder the right to collect the amount of tax deducted by the corporation. The preferred stockholder had contended that the law so construed by the United States Supreme Court in the *Penney* case imposed a tax upon corporate earnings and not upon the stockholder, but the Wisconsin Supreme Court held the tax to be on the stockholder and properly so deductible.

This basic conflict in construction given the law by the United States Supreme Court in the *Penney* case and that given it by the Supreme Court of the State of Wisconsin herein referred to, is further emphasized by two recent conflicting decisions in the Federal Courts, where the issue arose as to the right of a corporation to deduct the Wisconsin privilege dividend tax from gross income of the corporation under the Federal income tax law.

Judge Duffy of the Eastern District of Wisconsin in the case of *Wisconsin Gas & Electric Company* v. *United States of America*, 46 F. Supp. 929, held that because this Court had held in the *Penney* case that the tax was a supplementary corporate income tax, the tax was accordingly a tax on the corporation and properly deductible. Judge Duffy's decision was appealed to the Circuit Court of Appeals for the Seventh Circuit and on November 8, 1943, that Court reversed Judge Duffy's decision. *Wisconsin Gas & Electric Company* v. *United States of America*, — Fed. — (not yet officially reported). The reversal was based on the fact that since the decision by this Court in

the *Penney* case the Wisconsin Supreme Court has unqualifiedly construed the law not to impose a supplementary income tax upon the corporation as held by the majority of this Court, but rather has construed the law as a tax upon the stockholder. Recognizing the rule that Federal Courts are bound by the construction given a state law by the state courts, the Circuit Court of Appeals reversed Judge Duffy's decision. Judge Minton, who wrote the decision for the Circuit Court of Appeals for the Seventh Circuit, specifically recognized, however, that the reasoning of the *Penney* case as decided by this Court, supported Judge Duffy's decision when he stated:

> "At the time this case was decided by the district court, the Supreme Court of Wisconsin had not decided the case of Wisconsin Gas & Electric Co. v. Wisconsin Tax Department, supra, and Blied v. Wisconsin Foundry & Machine Co. supra. The trial court relied on the case of State of Wisconsin v. J. C. Penney Co. (311 U. S. 435, 61 Sup. Ct. 246, 85 L. Ed. 267.) *The reasoning of that case would seem to sustain the district court's position.*" (Italics ours.)

The Tax Court of the United States came to a diametrically opposite conclusion than that reached by the Circuit Court of Appeals for the Seventh Circuit in the *Wisconsin Gas & Electric Company* case. The Tax Court of the United States in the case of *Montreal Mining Company* v. *Commissioner of Internal Revenue* (Docket No. 106876, not yet officially reported) on September 16, 1943, squarely decided that a corporation had the right to deduct the Wisconsin privilege dividend tax from its gross income for the purpose of determining net income for income tax purposes under the federal income tax law, and held among other things as follows:

> "The Supreme Court, in Wisconsin v. J. C. Penney Co., 311 U. S. 435, considered the Wisconsin privilege

dividend tax in connection with a constitutional question. In discussing the statute imposing such tax the Court said:

> * * * The practical operation of this legislation is to impose an additional tax on corporate earnings within Wisconsin but to postpone the liability for this tax until such earnings are paid out in dividends. In a word, by its general income tax Wisconsin taxes corporate income that is taken in; by the Privilege Dividend Tax of 1935 Wisconsin superimposed upon this income tax a tax on corporate income that is paid out.

Thus, it is apparent that the tax in question was there determined to be a levy on corporate income. Upon the authority of that decision, we hold in petitioner's favor on this issue. The tax is deductible under section 23 (c) of the Revenue Acts of 1934 and 1936."

Thus, it will be observed that as a result of this Court's decision in the *Penney* case in which this Court in the majority opinion undertook to construe the law (which is contrary to the construction given the law by the Wisconsin Supreme Court), a conflict of decisions has resulted in the Federal Courts as a result thereof, and makes the question involved in this appeal even more substantial.

Furthermore, it is perfectly apparent that under the proper final construction given to this law by the Supreme Court of the State of Wisconsin as a transaction tax upon the stockholder, not the corporation, that the whole basis for this Court's decision in the *Penney* case is now removed. The majority decision of this Court in the *Penney* case made no attempt to overrule the case of *Connecticut General Insurance Company* v. *Johnson*, 303 U. S. 77, 58 Sup. Ct. 77. It was distinguished because of the construction placed upon the law as a supplementary income tax. The limits of a state's jurisdiction to tax, as reflected in

that case, is *a fortiori* applicable to the instant case under the construction of the law as now finally determined by the Wisconsin Supreme Court.

Thus, we submit that under the construction of the law by which this Court is now bound by settled authority, a substantial federal question clearly exists as to whether Wisconsin has jurisdiction to impose a tax on the transactions involved in this record:

Connecticut General Insurance Co. v. *Johnson*, 303 U. S. 77, 58 Sup. Ct. 436;

Provident Savings Life Assurance Society v. *Kentucky*, 239 U. S. 103, 111, 113;

St. Louis Compress Co. v. *Arkansas*, 260 U. S. 346, 348, 349;

Louisville Etc. Ferry Co. v. *Kentucky*, 188 U. S. 385, 396;

Union Refrigerator Transit Co. v. *Kentucky*, 199 U. S. 194, 202;

State Tax on Foreign Held Bonds, 15 Wall. 300, 319.

(2) *A substantial federal question is involved in the right of the State of Wisconsin to impose a tax upon alleged Wisconsin earnings allegedly in surplus regardless of the date of such earnings.*

Under the formula on which the tax in question was assessed, the alleged Wisconsin earnings in surplus from the date that the corporation first did business in Wisconsin to the date of the analysis (December 31st of the year preceding the declaration of the dividend) were included as part of the alleged Wisconsin earnings taxed. The result of the application of such a formula is to tax Wisconsin earnings which were earned many years prior to the enactment and passage of the privilege dividend tax law. It was contended throughout these proceedings that in any event that to the extent that earnings prior

to the enactment of the law were taxed that such law and tax was vulnerably retroactive and as such took the property of the appellant and its stockholders without due process of law and in contravention to the Fourteenth Amendment to the Constitution of the United States. The Wisconsin Supreme Court was evenly divided on this constitutional question, Mr. Justice Wickhem, Chief Justice Rosenberry, and Mr. Justice Martin being of the opinion that to the extent that the tax was attempted to be imposed upon Wisconsin earnings earned more than one year prior to the enactment of the law, that to that extent the law was unconstitutional under the Fourteenth Amendment of the Constitution of the United States. The contention of these three judges is concisely stated in the opinion of Mr. Justice Wickhem in the companion case of *International Harvester Company* v. *Department of Taxation*, 243 Wis. 198 at Page 208, wherein it is said:

> "Mr. Chief Justice ROSENBERRY, Mr. Justice MARTIN, and the writer are of the view, (1) that since the United States supreme court has held that the label placed upon this law by the legislature or by this court is wholly ineffective to impair its constitutionality as against the contention that Wisconsin is without power to levy the tax, such label or designation or the selection by Wisconsin of the payment and receipt of the dividend as the occasion for the tax is equally ineffective to save it from objections to its retroactivity; (2) that the earnings of the corporation in Wisconsin upon which are grounded Wisconsin's power to levy the dividend tax must be within reach of a retroactive tax; (3) that the extent of permissible retroactivity should be determined upon the analogy of the income tax cases; (4) that retroactivity should only be permitted to "recent" transactions; (5) that consistently with these principles the tax may not be applied to earnings in Wisconsin which accrued prior to the last corporate fiscal year preceding the enactment of Wisconsin privi-

lege dividend tax; (6) that by reason of the severability clause, the operation of the tax should be so limited; (7) that nothing in the decision upon remand requires a different conclusion."

Under any evaluation of the majority decision by this Court in the *Penney* case the only conceivable ground on which it was determined that Wisconsin had jurisdiction to tax was on the ground that Wisconsin gave protection to the earning of the income used in the payment of the dividend. This protection could be given only in the year in which the income was earned and clearly was not given in the year in which the dividend was paid. Accordingly, there would seem to be no question but what even if there is jurisdictional justification for this tax, and the majority decision in the original *Penney* case was adhered to, that to the extent that the law attempts to impose the tax on Wisconsin income in surplus *regardless of when earned*, and particularly to income earned many years prior to the enactment of the law, it is unconstitutional as taking the property of the appellant and its stockholders without due process of law and in contravention to the Fourteenth Amendment to the Constitution of the United States. That a substantial federal question exists in this respect is evidenced from the following cases:

Nichols v. *Coolidge*, 274 U. S. 531, 542, 543;
Welch v. *Henry*, 305 U. S. 134, 59 Supp. Ct. 121, 83 L. ed. 87;
Blodgett v. *Holden*, 275 U. S. 142, 147;
Coolidge v. *Long*, 282 U. S. 582, 595, 596;
Untermeyer v. *Anderson*, 276 U. S. 440, 445.

(g) Stage of Proceedings and Manner In Which the Federal Questions Were Raised.

The Federal questions on which assignment of error has been made have been raised in each step of this litigation before the appropriate bodies.

On the Federal constitutional question of jurisdiction to tax, the appellant raised the question of the validity of the law and purported tax in its claim for abatement filed with the Wisconsin Department of Taxation. The question was again raised in the petitions to review before the Wisconsin Board of Tax Appeals in the various assessments. This same Federal Constitutional question was again specifically raised in the notice to appeal to the Circuit Court for Dane County from the decision of the Wisconsin Department of Tax Appeals (R. 199, 208-212). This same Federal Constitutional question was further raised in the Supreme Court of the State of Wisconsin in the briefs filed with that Court, which is the only method under Wisconsin practice where such questions can be raised (Appellant's brief, pages 2, 14).

So, also was the Federal Constitutional question of retroactivity raised throughout all stages of these proceedings in the same manner and before the same tribunals, as was the question of jurisdiction to tax (R. 201, 212-213, and Appellant's Supreme Court Brief at pages 2 and 50) (R. 221).

(h) Manner In Which Questions Involved Were Passed On By the Court.

The application for abatement filed with the Department of Taxation raising these federal questions was denied. The decision and order of the Wisconsin Board of Tax Appeals further denied relief on these constitutional questions. The Circuit Court for Dane County specifically

passed upon the constitutional questions so raised, but denied relief to the taxpayer.

The Supreme Court of the State of Wisconsin further specifically passed on the Federal Constitutional questions on which error has been assigned and denied relief to the appellant. On the constitutionality of the retroactivity phase of the case, the Supreme Court of the State of Wisconsin was evenly divided, but because the trial court had held the law to be constitutional, the decision was affirmed.

(i) Excerpts From the Record Bringing Case Within the Statute Conferring Jurisdiction in the Supreme Court.

There is no question but what in these proceedings the Federal Constitutional questions on which error has been assigned were drawn in question on the ground that the law and tax was repugnant to the Constitution of the United States and the decision of the State Courts were in favor of the validity of such statute and tax. Typical of the method in which these matters were raised in the record are the following excerpts in the appeal proceedings before the Circuit Court for Dane County as follows:

> "(1) That by reason of the facts above stated the transaction upon which the privilege dividend tax is attempted to be imposed in respect to the Minnesota Mining and Manufacturing Company are wholly outside the jurisdiction of the State of Wisconsin, with the exception of the transfer of the dividends by the Company to certain of its stockholders residing in Wisconsin, in which case the transaction takes place partly within and partly without the jurisdiction of said State. To the extent that the privilege dividend tax is attempted to be imposed on transactions wholly outside of the jurisdiction of the State, it is unconstitutional and void and in violation of the rights of the Minnesota Mining and Manufacturing Company and of its stockholders residing outside the state, under

Article I, Sections 1 and 9 of the Wisconsin Constitution and under the Fourteenth Amendment of the Constitution of the United States.

(2) That the aforesaid privilege dividend tax law is unconstitutional and void, and in violation of the rights of the Minnesota Mining and Manufacturing Company and of its stockholders residing outside the State of Wisconsin, under Article I, Sections 1 and 9 of the Constitution of the State of Wisconsin and the Fourteenth Amendment of the Constitution of the United States, in that it deprives them of their liberty and or property without due process of law, because it imposes upon such non-resident stockholders what is in effect a tax upon the income of such stockholders, although such income is not earned within the State of Wisconsin nor derived from property or business conducted within the State of Wisconsin, and in that it imposed upon the Minnesota Mining and Manufacturing Company a duty of paying and withholding from said stockholders an unconstitutional tax which requires the expenditure of time and money on the part of the Company to compute, pay and withhold the tax.

Although the privilege dividend tax makes the stockholder ultimately liable for the tax, the Company, nevertheless, has legal standing to object to the validity of the law for the reason that, if the aforesaid privilege dividend tax law is unconstitutional, the Company is being subjected to an unconstitutional burden, and further because in practice it is impossible to withhold the exact amount of the tax from each stockholder, and it therefore becomes necessary for the Company to pay a part of the tax out of its general funds.

(3) That the aforesaid privilege dividend tax law is unconstitutional and void, and in violation of the rights of the Minnesota Mining and Manufacturing Company and of its stockholders under Article I, Sections 1 and 9 of the Constitution of the State of Wisconsin and the Fourteenth Amendment of the Constitution of the United States, in that it deprives them of property without due process of law by imposing a tax upon the privilege of receiving and paying out dividends,

which privilege is not granted by and could not constitutionally be denied by the State of Wisconsin, such privilege being granted by the State of Delaware and exercised pursuant to the laws of said state.

(4) That the aforesaid privilege dividend tax law is unconstitutional and void insofar as it imposes a tax upon dividends which are paid by the Company to stockholders residing outside Wisconsin, because it is in effect a tax upon stock held by such stockholders, or upon the dividend which is a debt of the Company when declared, which are outside the jurisdiction of the State; and such tax, therefore, deprives the Minnesota Mining and Manufacturing Company and its stockholders residing outside the State of Wisconsin of liberty and or property without due process of law, in violation of the provisions of the Constitution of the State of Wisconsin" (R. 208-210).

* * * * * * *

"(11) That in the modified assessments as confirmed by the Board of Tax Appeals in computing the alleged portion of Wisconsin income in surplus the taxing authorities use as a numerator the total alleged Wisconsin income in surplus over total alleged surplus as a denominator, rather than alleged Wisconsin earnings for any particular year over total surplus. Such a formula is neither contemplated by the act nor is it constitutionally valid. As a result of the use of this formula an attempt is made to levy a tax upon dividends allegedly paid out of earnings derived many years prior to the effective date of the privilege dividend tax law, and the effect of such a formula renders the law as applied unconstitutional under the Fourteenth Amendment of the Constitution of the United States and under Article I, Sections 1 and 9 of the Constitution of the State of Wisconsin, and further void under Article I, Section 12 of the Wisconsin Constitution and Article I, Section 10 of the Constitution of the United States" (R. 212-213).

The Federal questions were also raised in the brief of he appellant filed in the Supreme Court of the State of Visconsin as follows:

> "1. Is the Wisconsin Privilege Dividend Tax Law, as applied by the Wisconsin Department of Taxation in making the additional assessments in question against a foreign corporation on the socalled "surplus analysis" theory, constitutional under the due process and contract clauses of the Wisconsin Constitution and the Federal Constitution, and under Article VIII, Section 1 of Wisconsin Constitution?
>
> The Court below held the law as applied constitutional." (Appellant's brief, R. 221.)

The questions were further raised in appellant's brief t Page 14 of appellant under heading as follows:

> "The Wisconsin privilege dividend tax as applied by the Department of Taxation in making the assessment in question is unconstitutional under both the State and Federal Constitution. (Article I, Sections 1 and 9, and Article VIII, Section 1, of State Constitution and 14th Amendment to Constitution of United States.)" (R. 221.)

The questions were further raised in appellant's brief t Page 50:

> "If any tax can validly be assessed, the tax in the instant case was improperly computed; if the law is construed to permit assessment as made, it is vulnerably retroactive and unconstitutional under the due process clauses of both State and Federal Constitutions" (R. 221).

(j) Copy of Opinions on Renditions of Judgment.

There are attached hereto the following copies of opinions and marked with the respective exhibit as reflected herein:

(1) Copy of opinion of the Wisconsin Board of Tax Appeals in this matter—Exhibit "A".

(2) Copy of opinion of Circuit Court for Dane County in instant case—Exhibit "B".

(3) Copy of opinion of Circuit Court for Dane County in companion case of *International Harvester Company* v. *Department of Taxation* adopted by way of reference in support of decision in instant case—Exhibit "C".*

(4) Copy of decision of Supreme Court of Wisconsin in instant case, 243 Wis. 211, 10 N. W. (2d) 174—Exhibit "D".

(5) Copy of decision of Supreme Court of Wisconsin for rehearing in instant case (11 N. W. (2d) 96)—Exhibit "E".

(6) Copy of opinion of Supreme Court of Wisconsin in companion case of *International Harvester Company* v. *Department of Taxation* (243 Wis. 198, 10 N. W. (2d) 168), and adopted by way of reference to decision in instant case—Exhibit "F".*

(k) Cases Believed to Sustain Jurisdiction.

The following cases are believed to sustain the jurisdiction of this Court:

Connecticut General Insurance Co. v. *Johnson*, 303 U. S. 77, 58 Sup. Ct. 77;

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* (Clerk's Note.—Exhibits "C" and "F" are printed as Appendices to the Jurisdictional Statement in No. 620, October Term, 1943, and are not reprinted here.)

Hans Rees' Sons v. *North Carolina*, 283 U. S. 123;
J. D. Adams Manufacturing Co. v. *Storen*, 304 U. S. 307, 58 Sup. Ct. 913;
Hoeper v. *Tax Commissioner*, 284 U. S. 206;
Ficher's Blend Station v. *Tax Commissioner*, 297 U. S. 650.

Respectfully submitted,

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EXHIBIT "A".

COPY OF DECISION OF WISCONSIN BOARD OF TAX APPEALS RENDERED ON FEBRUARY 13, 1942

WISCONSIN BOARD OF TAX APPEALS

MINNESOTA MINING AND MANUFACTURING COMPANY, a Delaware Corporation, *Petitioner*,

vs.

WISCONSIN DEPARTMENT OF TAXATION, *Respondent*

Decision and Order

Docket No. D-43, Docket No. D-614, Docket No. D-624.

Three cases, all involving assessments of Wisconsin privilege dividend taxes, are here consolidated for the purpose of determination. They are appeals from the assessment of such taxes by the Wisconsin Tax Commission and its successor, the respondent, for the years 1936 to 1940, inclusive, and from the denial by the respondent of petitioner's application for abatement thereof in each case. These appeals pertain to taxes alleged to be due on dividends paid as follows: D-624 in the year 1936; D-43 in the year 1937; and D-614 in the years 1938, 1939, and 1940.

We make the following findings of fact: The petitioner is a Delaware corporation with its principal office and place of business in St. Paul, Minnesota. It operates a factory at Wausau, Wisconsin, manufacturing roofing granules. It purchased this factory in 1929 and began manufacturing operations therein in 1930. Sales are made through an office in Chicago, Illinois, but all orders are confirmed at the St. Paul office, and shipping instructions are forwarded from there. Purchasers of products manufactured in Wisconsin remit direct to the St. Paul office and the proceeds are there mingled with funds from sales from other factories and other divisions of petitioner's business. Checks for payrolls are prepared at the St. Paul office and are drawn on a Wausau bank. A deposit equaling the amount of the pay-

roll is forwarded to the Wausau Bank on the same day the checks are forwarded.

The Company reports on a calendar year basis, taking an inventory and closing its books as of December 31 of each year. The Company maintains but one general surplus account and none of the earnings derived by it from property located in or business transacted in Wisconsin are segregated in any way. The petitioner does not maintain a separate balance sheet for Wisconsin operations, nor is there a separate surplus account for this state.

All dividends during the years in question were declared by the Board of Directors of the Company at meetings held in St. Paul. The First Trust Company of St. Paul is the transfer agent for the petitioner. All of the dividends paid by the petitioner during the period here under review were paid to the transfer agent in St. Paul, by a check drawn on a St. Paul bank and distributed to the Company's stockholders by the transfer agent. Dividends were paid from surplus, pursuant to the laws of Delaware, and not from current earnings.

The petitioner challenges the validity of the assessments made for the several years here involved and contends:

First, that the Wisconsin privilege dividend tax law is unconstitutional; Second, that the respondent's method of computing the tax is invalid; Third, that the assessments, if found to be valid, should not be subject to penalties and interest.

The Wisconsin statutes here involved are Section 71.60, Section 3 (1), (2), and (4):

> "(1) For the privilege of declaring and receiving dividends, out of income derived from property located and business transacted in this state, there is hereby imposed a tax equal to three per centum of the amount of such dividends declared and paid by all corporations (foreign and local), except those specified in paragraphs (d) and (g) of subsection (1) of section 17.05 of the statutes, after the passage and publication of this act and prior to July 1, 1941. Such tax shall be deducted and withheld from such dividends payable to residents and nonresidents by the payor corporation.

"(2) Every corporation required to deduct and withhold any tax under this section shall, on or before the last day of the month following the payment of the dividend, make return thereof and pay the tax to the tax commission, reporting such tax on the forms to be prescribed by the tax commission.

"• • •

"(4) In the case of corporations doing business within and without the state of Wisconsin, such tax shall apply only to dividends declared and paid out of income derived from business transacted and property located within the state of Wisconsin. The amount of income attributable to this state shall be computed in accordance with the provisions of chapter 71. In the absence of proof to the contrary, such dividends shall be presumed to have been paid out of earnings of such corporation attributable to Wisconsin under the provisions of chapter 71, for the year immediately preceding the payment of such dividend. If a corporation had a loss for the year prior to the payment of the dividend, the tax commission shall upon application, determine the portion of such dividend paid out of corporate surplus and undivided profits derived from business transacted and property located within the state."

In our opinion the following decisions clearly hold that the Wisconsin privilege dividend tax law is constitutional: *State ex rel. Froedtert Grain and Malting Company* vs. *Wisconsin Tax Commission*, 221 Wis. 225; *Minnesota Mining and Manufacturing Company* vs. *Wisconsin Tax Commission*, 298 N. W. 186; *J. C. Penney Company* vs. *Wisconsin Department of Taxation, et al.*, 311 U. S. 435.

We find that the respondent's computations of privilege dividend taxes due from the petitioner were proper and valid and complied with that statute as construed by the Wisconsin Supreme Court in *Minnesota Mining and Manufacturing Company, supra*. *Appeal of International Harvester Company*, WBTA (decided February 13, 1942)

The privilege dividend tax law requires every corporation liable under the law to make a return thereof and pay the tax to the respondent on or before the last day of the month following the payment of dividends. There is no statutory provision for the waiver of interest and penalties, and in our opinion the amounts due from the petitioner during the years in question as recomputed by the respondent are subject to the interest and penalties prescribed by law. *Laabs* vs. *Tax Commission*, 218 Wis. 414.

We find the correct assessment for the several periods here involved to be:

D-624, 1936	$2,220.66
D-43, 1937	3,037.75
D-614, 1938, 1939, 1940	9,307.08

To the above amounts interest and penalties are to be added as provided by law.

It is Ordered:

That the additional assessments appealed from be and the same are hereby modified to conform to the findings announced herein, and as so modified, the assessments are hereby affirmed.

Dated at the State Capitol, Madison, Wisconsin, this 13th day of February, 1942.

WISCONSIN BOARD OF TAX APPEALS
G. E. BROADFOOT,
Chairman,
W. J. CONWAY,
HARRY SLATER.

EXHIBIT "B".

COPY OF DECISION OF CIRCUIT COURT FOR DANE COUNTY, HONORABLE ALVIN C. REIS PRESIDING, IN INSTANT CASE UNDER DATE OF AUGUST 14, 1942.

By the Court

This is a dividend tax case, companion to International Harvester Company *vs.* Wisconsin Department of Taxation, decided this date.

Appellant herein raises a further issue. One of its officers testified before the Board of Tax Appeals, there were "no dividends declared out of profits earned in Wisconsin because the earnings were all used to expand the business in Wisconsin."

The appellant's position is expressed at pp. 26-27 of its brief, referring to Exhibit 15 before the tax body: "This exhibit and the testimony with respect thereto, we submit, conclusively proves that all Wisconsin earnings, plus additional advances from St. Paul, come back to Wisconsin operations and are represented primarily in capital investments in the form of physical assets. As such obviously these Wisconsin earnings were not and could not be available for the purpose of paying dividends. * * * Exhibit 15 reflects conclusively that in each year since the appellant has been in Wisconsin to and including 1940, the total advancements from St. Paul at all times has substantially exceeded the amount repaid to the home office in St. Paul out of Wisconsin income. In short, Wisconsin income has never been used for the purpose of paying dividends."

We do not believe that the company's argument is logical. The fact that the company increased its capital investment in Wisconsin, does not destroy the further fact that its Wisconsin income went into the common surplus and increased generally the corporation's dividend potentialities to the extent of that contribution. If it had lost money in Wisconsin, there is nothing to indicate that its capital assets in the state would have been affected. Therefore, the

profit realized in Wisconsin places the aggregate corporate surplus just that much ahead.

Upon all other issues, the reasoning and factual background set out in our opinion in the International Harvester case this date are applicable, *mutatis mutandis*, to the situation of Minnesota Mining and Manufacturing Company.

We, of course, can not waive statutory penalties and interest, as the present appellant requests.

The attorney general may prepare and submit to appellant's attorneys the order and judgment affirming the decision and order of the Board of Tax Appeals.

* * * * * * *

EXHIBIT "C".

COPY OF OPINION IN CASE OF MINNESOTA MINING & MANUFACTURING COMPANY VS. DEPARTMENT OF TAXATION, 243 WIS. 211, 10 N. W. (2D) 174. MARCH 10—JUNE 16, 1943.

WICKHEM, *J.*:

The facts in this case are not in substantial dispute. Appellant is a Delaware corporation, with its principal office and place of business in St. Paul, Minnesota. It operates a factory at Wausau, Wisconsin, manufacturing roofing granules. This factory began manufacturing operations in 1930. Sales are made through an office in Chicago but orders are confirmed at the St. Paul office. When products so manufactured are sold, the remittances are made directly to the home office at St. Paul, and the funds from such sales are deposited in the general account of the appellant. Pay rolls, together with pay checks, are prepared at the St. Paul office and drawn on a Wausau bank, and a deposit equaling the amount of the pay roll is forwarded to the Wausau bank to cover the checks at approximately the same time that the checks representing the pay roll are forwarded. The company reports upon a calendar-year basis, closing books as of December 31st, each year. It maintains

one general surplus account and none of the earnings from property located or business transacted in Wisconsin are segregated in any way. It maintains no separate balance sheet for Wisconsin operations. Dividends are declared by the board of directors of the company at meetings held in St. Paul; the First Trust Company of that city being the company's transfer agent. All dividends are paid to this transfer agent by check drawn upon a St. Paul bank and distributed to the stockholders by the transfer agent. Dividends are paid from surplus.

Sec. 34, Delaware Corporation Law, empowers corporations to declare and pay dividends either out of net assets in excess of its capital, or out of net profits for the fiscal year then current "and/or" the preceding fiscal year.

In making the assessments the department of taxation analyzed the surplus on December 31st of the year preceding that in which a particular dividend was paid. In this analysis, the department went back to the date on which the corporation commenced doing business in Wisconsin for the purpose of determining, (1) total surplus existing at that time; (2) the ratable contribution of earnings in Wisconsin to the surplus as of December 31st, prior to the declaration of the dividends. The department selected the close of the year preceding the payment of the dividend as the basis of its computations rather than the surplus at the time of the payment or receiving of the dividend, it being the view of the department that unless the corporation had closed its books and taken inventory at the time of the payment of the dividend (in which case analysis would have been made as of that time) it would be impossible to revise the surplus as of each dividend-paying date. The dividends were paid out of the corporation's general account. There never was any attempt made to earmark any of the earnings coming from Wisconsin or other states, although the corporation did business in all of the other states of the Union.

Such contentions by appellant as question the constitutionality of the privilege dividend tax as applied by the Department of Taxation are sufficiently answered by the opinion in *International H. Co. v. Department of Taxation*, *ante*, p. 198, 9 N. W. (2d) —. We proceed, therefore, to deal with contentions peculiarly applicable to this case.

Appellant contends that the department has not analyzed the surplus of appellant as of the date of the payment of the dividend. The record shows that dividends were paid on December 7, 1936, December 10, 1937, December 12, 1938, December 21, 1939, and December 10, 1940. The department analyzed appellant's surplus as of December 31, 1935, 1936, 1937, 1938, and 1939, respectively, for the reason that the corporation closed its books and took inventory as of those dates. We see no objection to this method. It is the same basis upon which the dividend was declared, namely, the ascertained surplus of the corporation available for dividends. We are not persuaded that there is anything jurisdictionally or procedurally lacking in a method of computation which follows the ordinary course of business adopted by the corporation itself in voting its dividend. Aside from this, there is a strong inference that dividends are paid out of assets ascertained to be available for this purpose. The normal corporate procedure is to use the last annual inventory and closing of the books to furnish the information, and the dividend is customarily based on the situation thus disclosed. If some accurate method is in use in a particular case to disclose the general corporate situation as of the time of the dividend, it is for the corporation to show this, and if satisfactorily shown, it is proper for the department to use this as a basis for the tax.

It is next contended that no Wisconsin income was used in the payment of dividends, because the record demonstrates that all Wisconsin income was reinvested in physical assets of the corporation in Wisconsin. This contention misses the point. It seems to us that it can make no possible difference what is done with the particular money earned in Wisconsin so long as the earnings go to swell the total assets of the corporation. To the extent that they do this, and increase the margin of assets over liabilities, including capital, they are a proportional part of the funds available for dividends. None of the Wisconsin earnings are earmarked. According to the record, they are turned in to the home office, and reinvested in physical assets located in Wisconsin. This does not repel the inference that Wisconsin net earnings are a part of the funds out of which dividends are declared and paid.

It is finally contended that even if the assessments a held valid or partially valid, penalties and interest shou not be imposed. We find the statutory requirements e tirely clear and unambiguous upon this point, and there no attack upon the validity of the provisions. Hence, can only paraphrase what was said by this court in *State Baker*, 232 Wis. 383, 396, 286 N. W. 535, 287 N. W. 690, th despite the urge to find a way to avoid the imposition penalties, "We are bound by the clear unambiguous la guage of the statute and cannot by judicial constructi introduce into them provisions and remedies which do n exist." See in this connection *Laabs v. Tax Comm.*, 2 Wis. 414, 261 N. W. 404; *State ex rel Crucible S. C. Co. Tax Comm.*, 185 Wis. 525, 201 Wis. 764.

By the Court.—Order and judgment affirmed.

Barlow, J., took no part.

EXHIBIT "D".

IN SUPREME COURT, STATE OF WISCONSIN.

August, 1943 Term

January, 1943 Calendar

No. 57

11 N. W. (2d) 96

Minnesota Mining & Manufacturing Company, *Appella*

v.

Wisconsin Department of Taxation, *Respondent.*

Wickhem, *J.* on re-hearing:

The court has thoroughly considered the motions f rehearing filed herein and is not disposed to modify i views or to restate or amplify its opinion in any respect h one. In discussing the permissible retroactivity of t privilege dividend tax and noting an equal division of t

court upon that point, the opinion did not indicate whether the difference in view was based upon the constitution of the state of Wisconsin, the constitution of the United States of America, or both. It may be useful to state that the constitutionality of the law in this respect was considered under both; and the court was of the view that the same considerations governed whichever constitution was applied.

By the Court:—Motion for rehearing is denied, with $25 costs.

(370)

[illegible] COM-
[illegible]

[illegible]

vs.

[illegible] DEPARTMENT OF TAXATION,

[illegible]

On Appeal from the Supreme Court
of the State of Wisconsin.

[illegible] Opposing Appellee's Motion to
[illegible] Affirm Decision of State Court.

JOHN L. CONNOLLY,
and
E. BURGESS ELA,
Attorneys for Appellant.

SYNOPSIS.

Synopsis—*Continued.*

Synopsis—*Continued.*

Authorities.

Authorities—*Continued.*

In the Supreme Court of the United States

October Term, 1943

No. .....

MINNESOTA MINING & MANUFACTURING COMPANY,

Appellant,

vs.

WISCONSIN DEPARTMENT OF TAXATION,

Appellee.

Brief of Appellant Opposing Appellee's Motion to Dismiss Appeal or Affirm Decision of State Court.

In accordance with Rule 12, Par. 3, and Rule 7, Par. 3, of the Rules of The Supreme Court of the United States appellant files this brief opposing appellee's motion to dismiss or in the alternative to affirm, which was filed with appellee's Statement Opposing Jurisdiction.

The alternative motions of appellee and the statement of appellee opposing jurisdiction are limited to a contention that no substantial federal question exists either on the question of jurisdiction to tax or on the grievance of the appellant with respect to the retroactive application of the tax.

The appellant's Jurisdictional Statement answers most of the arguments asserted by appellee in its Opposing Statement, and this brief so far as possible will be confined to specifically answering certain assertions made by the appellee.

Argument.

POINT I. This case presents substantial federal questions which have not been ruled upon by the court on the jurisdiction of Wisconsin to levy the tax in question.

(a) *In view of the construction given the taxing law by the Supreme Court of Wisconsin, the decision in the J. C. Penney Company case does not apply.*

Appellee argues that the decision of this court in *State of Wisconsin vs. J. C. Penney Co.* (1940), 311 U. S. 435; 61 S. Ct. 246, 85 L. Ed. 267, and companion cases completely preclude there being any substantial federal question in the instant case. We submit that this assertion is without merit.

We pointed out in our Statement as to Jurisdiction that in the *J. C. Penney* case the constitutionality of the law, so far as jurisdiction to tax was concerned, was based

solely on a construction that the law was a supplementary income tax on the corporation and it was held that because the state had given protection to the corporation in the earning of the income it afforded sufficient basis to support the levying of a tax on this corporate income when used in the payment of a dividend. We further pointed out that the whole controversy between the majority and dissenting divisions of this court was predicated on a disagreement between the two divisions as to the nature of the tax and the incidence of the tax;—the majority holding it was a supplemental corporate income tax, the minority holding that it was a transaction tax on the stockholder. No attempt was made in the majority opinion to sustain the law as a transaction tax against the stockholder.

The whole foundation and basis on which the constitutional justification for the tax was predicated has now been entirely removed by the construction given the law by the Wisconsin Supreme Court in a series of cases subsequent to this court's determination in the *Penney* case. That court unequivocally holds the tax to be a transaction tax on the stockholder (as it would seem the statute unequivocally contemplates), and specifically denies that it is an income tax of any kind or nature against the corporation.

J. C. Penney Company vs. Tax Commission (on remand from this court), 238 Wis. 69, 73;

Blied vs. Wisconsin Foundry and Machine Co., 243 Wis. 221, 10 N. W. (2d) 142;

Wisconsin Gas and Electric Company vs. Department of Taxation, 243 Wis. 216, 10 N. W. (2d) 140.

The opinion of the trial judge, Alvin C. Reis, rendered in the companion case of *International Harvester Co. vs Wisconsin Department of Taxation*, clearly and accurately

reflects the basic difference in what he has asserted to be an "immaculate dilemma" which has been created as the result of the consideration of the *Penney* case by this court as a corporate income tax and the unequivocal determination of the Wisconsin Supreme Court that the tax is a transaction tax on the stockholder. The decision of Judge Reis is an exhibit in the appellant's Statement as to Jurisdiction.

It should also be noted that another most serious constitutional problem arises, if under the present state of the litigation, the result arrived at in the *Penney* case on the jurisdictional question is not changed. If there was justification for Mr. Justice Frankfurter's conclusion in that case that the law was in substance a supplementary income tax it was solely on the ground that the Wisconsin court *at that time* had not determined the incidence of the tax, having merely held that the tax as a transaction tax was unconstitutional. While it appeared quite clearly from the statute and from the consideration that the Wisconsin supreme court had given the statute that the construction given the law by Mr. Justice Frankfurter was incorrect and that the tax that he held it to be was not the tax enacted by the legislature, it would be even more of a fundamental error, if now, in view of the unqualifiedly clear determination of the Wisconsin supreme court, this court should persist in construing the law to mean something other than that determined by the Wisconsin supreme court in order to *sustain* it against constitutional attack.

We can illustrate our observation by consideration of what Mr Justice Frankfurter apparently did in the *J. C. Penney Company* case. In that case the Wisconsin supreme court had seemingly held the tax in question to be an excise tax and to be in violation of the federal constitution. The case then came to this court for the sole purpose of deter-

mining the federal question of whether the Wisconsin court had correctly applied the provisions of the federal constitution to the statute as so construed. Instead of deciding that question this court in effect seemingly overruled the construction so accorded to the statute by the Wisconsin court and held the tax to be an income tax on the corporation, and hence compatible with the Fourteenth Amendment. That is to say, this court overruled the apparent construction accorded to the statute by the state supreme court for the purpose of *sustaining* the statute—not for the purpose of finding that it encroached upon the federal constitution. It should be specifically noted that this court and the Wisconsin supreme court were not differing as to the meaning of the federal constitution—they were differing as to the meaning of a Wisconsin Statute. Did this court have the power to in effect overrule the state court's construction for the purpose of *sustaining* the statute? That was a most important question in the *Penney* case and it becomes increasingly so in view of the present unqualified construction that is now placed upon the law by the Wisconsin court. From the standpoint of the public, from the standpoint of political theory, and from the standpoint of the distribution of power between a state and the United States, this question is of vital importance.

In the *Penney* case this court in its majority opinion apparently *assumed* that it had such power — it did not expressly decide the question of whether it had that power. The decision of that question is far too important to rest upon mere inference. So far as we have been able to determine, after a thorough search, the *J. C. Penney Company* decision was the first decision in the history of the United States Supreme Court that had ever presumed to overrule a state court's construction of a statute for the purpose of sustaining the statute. The usurpation of this

power can have such far-reaching effects that the right to so do should be firmly and unequivocably challenged.

It is of course fundamental that the United States Supreme Court is the guardian of the federal constitution and as such it is the final authority on the meaning of its provisions. Thus the *entire* power to construe the statutes springs from the right and duty of the United States Supreme Court to *prevent* encroachment by any of the states upon the United States constitution.

The reserved power not delegated by the constitution clearly includes the right of a state supreme court to be the final arbiter of the meaning of a statute adopted by the state legislature. In order for the United States Supreme Court to interfere with the powers of the state supreme court to finally construe a statute, it must appear that regardless of the construction adopted by the state, that the thrust of the statute is such as to encroach upon the federal constitution. That fact should be noted carefully, namely, that the right of the United States Supreme Court to overrule the construction placed upon a state statute is only an incident, and can only be exercised as an incident, of the power to prevent encroachment on the federal constitution. *Truax vs. Corrigan,* 257 U. S. 312, 324. In the absence of a finding by the United States Supreme Court, that under what it finds to be the true construction of the statute (as distinguished from the construction adopted by the state court), the statute *invades* the federal constitution, that court must accept the construction placed upon the statute by the state supreme court. Until the decision of this court in the *Penney* case the decisions of this court were consistent with the foregoing. Thus it had been held in a long line of decisions that where a state statute had been construed by the highest tribunal of the state, such construction is regarded as a part of the statute and is as binding upon this court as the text of the statute itself.

The Commercial Bank of Cincinnati vs. Buckingham's Executors, 5 How. 317, 343, 12 L. Ed. 169 (1847);

Hotel and R. E. Int. A. vs. Wis. E. R. Bd., 315 U. S. 437, 440-441 (1942);

Brinkerhoff-Faris Trust and Sav. Co. vs. Hill, 281 U. S. 673, 680, 74 L. Ed. 1107 (1930);

Phoenix Ins. Co. vs. Gardiner, 78 U. S. 204, 206, 20 L. Ed. 112;

Minnesota ex rel Pearson vs. Probate Court, 309 U. S. 270, 273, 84 L. Ed. 744;

Rawlins vs. Georgia, 201 U. S. 638, 639, 50 L. Ed. 899.

The substance of the holdings of the above cited decisions is briefly stated by Mr. Justice Holmes in *Rawlins vs. Georgia,* 201 U. S. 638, 639, 50 L. Ed. 899, 900, where he declared:

> "• • • If the state Constitution and laws as construed by the state court are consistent with the 14th Amendment, we can go no further."

Although not expressly called such, there is a well-established exception to the rule above noted, and that is that the United States Supreme Court has the power to disregard the construction placed upon a statute by the state supreme court when it finds that the true meaning of a statute is such as to encroach upon the federal constitution.

Hanover Fire Ins. Co. vs. Carr, 272 U. S. 494, 509, 71 L. Ed. 372, 380;

Macallen Co. vs. Massachusetts, 279 U. S. 620, 73 L. Ed. 874;

St. Louis Cotton Compress Co. vs. Arkansas, 260 U. S. 347, 67 L. Ed. 297;

Carpenter vs. Shaw, 280 U. S. 363, 74 L. Ed. 478.

In the decision of the *J. C. Penney Company* case, it appears that Mr. Justice Frankfurter either advertently or inadvertently applied the *exception to the rule* in such a way as to completely abrogate *the rule itself.* In that case, the court apparently held that it would determine for itself what the statute means, and then proceed to construe the statute so as to *sustain it* — not to *prevent* a constitutional encroachment.

It is noted in our Statement on Jurisdiction that if there was any justification for this court construing the statute as it did in the Penney case it was only because *as of that time* the state court may not have clearly determined the incidence of the tax. There can now be no possible justification for such approach, in view of the determination that the state supreme court has now made of the meaning of the law. Accordingly a decision similar to that made by the majority decision of Mr. Justice Frankfurter in the *Penney* case can now only be made by a complete usurpation of the power of the state court to construe its own statute, and in complete disregard of fundamental constitutional law.

That a court is required to accept a tax law as drawn by the legislative body enacting it and is not at liberty to sustain a law by reshaping it to a form where it *might* constitutionally accomplish substantially the same result, is a fundamental rule of law of this court and should not be overlooked or disregarded in the instant case.

This rule was succinctly stated and recognized by Mr. Justice Holmes in *Oklahoma vs. Wells Fargo & Co.*, 222 U. S. 298 at 302, where the learned Justice said:

> "Neither the court below, nor this court can reshape the statute simply because it embraces elements it might have reached if it had been drawn with a different measure and intent."

And the rule is further recognized by Mr. Justice Holmes, with whom Mr. Justice Moody concurred in a dissenting opinion in *Chanler vs. Kelsey*, 205 U. S. 466 at page 482, where it is said:

> "And I also repeat that it has no bearing upon the matter that by a different law the state might have derived an equal revenue from these donees in the form of a tax."

The above rules must be respected in the instant case. This court being bound by the construction of the law as given it by the state court neither has the right to consider its constitutionality as a supplementary corporate income tax nor indeed as any other tax against the corporation, but solely as a transaction tax against the stockholders.

Because the legislature might have enacted a law which would be constitutionally valid (i.e. a supplementary corporate income tax) does not justify this court in sustaining the instant law on the ground that it might have been enacted in a different form under which it would have produced the same amount of revenue.

Under the law as now authoritatively construed, by which this court is clearly bound (i.e. that the law imposes a transaction tax on the stockholder), the dissenting opinion of Mr. Justice Roberts in the *J. C. Penney Company* case is in all respects applicable. In the exercise of intellectual logic it would now seemingly require that this dissenting opinion now be adopted as the decision of this court. Mr. Justice Roberts' dissent, if the law is deemed to impose a transaction tax on the stockholder was not challenged by the majority, nor could it successfully be challenged if the "due process" clause is to have any force or effect whatsoever.

Appellee's counsel also argue that there is nothing inconsistent with the decision of this court in the *Penney*

case and that of the Wisconsin court on remand in the *Penney* case and in the subsequent decisions of the supreme court construing the Wisconsin Privilege Dividend Tax law.

We noted in our Jurisdictional Settlement that the federal courts have found a distinct conflict in the basic construction of the law given by this court in the *Penney* case and the Wisconsin court in the subsequent series of cases.

Judge Duffy, of the Eastern District of Wisconsin, in the case of *Wisconsin Gas and Electric Company vs. United States of America*, 46 F. Supp. 929, a case decided after the decision of the *J. C. Penney Company* case in this court but before the series of decisions in the Wisconsin supreme court, held that because this court had held in the *Penney* case that the tax was a supplementary corporate income tax, the tax was accordingly a tax on the corporation and properly deductible by the corporation for income tax purposes. This decision was appealed to the Circuit Court of Appeals for the 7th Circuit where it was heard *after* the series of recent decisions in the Wisconsin supreme court on the Privilege Dividend Tax law. The Circuit Court of Appeals in *Wisconsin Gas and Electric Co. vs. U. S.*, 138 F. (2d) 597, 598, reversed Judge Duffy because of the recognition of the fact that federal courts are bound by the construction of the law given by the state courts and recognition of the fact that the state court has now construed the incidence of the tax to be upon the stockholder. Judge Minton, who wrote the decision for the Circuit Court of Appeals, specifically recognized that the reasoning of the majority decision in the *Penney* case in effect sustained the conclusion of Judge Duffy that the tax was a tax on the corporation. Judge Minton, in referring to the decision of the *Penney* case by this court, said at page 598:

"The reasoning of that case would seem to sustain the district court's position."

Petition for certiorari to this court was filed on December 30, 1943 for a review of *Wisconsin Gas and Electric Co. vs. U. S.*, and appears as docket No. 565, October 1943 term.

The Tax Court of the United States on the other hand in a recent decision in *Montreal Mining Company vs. Commissioner of Internal Revenue, Respondent* (docket 106876.—2 T. C. No. 85, decided September 16, 1943) squarely decided that a corporation had a right to deduct the Wisconsin privilege dividend tax from its gross income for the purpose of determining net income for income tax purposes because it held that this court had determined the tax to be an income tax against the corporation. Thus it quite clearly appears that the federal courts recognized the conflict in the construction of the law existing between the decision of this court in the *Penney* case and the decisions of the Wisconsin supreme court.

As asserted in our Jurisdictional Statement the whole basis on which the law was sustained from a jurisdictional standpoint in the *J. C. Penney* case has now been removed.

(b) *In view of the determination of the Wisconsin Supreme Court that the tax is against the stockholder, the law cannot be jurisdictionally sustained without a complete and unwarranted disregard of the corporate entity and a complete disregard of all decisions of this court.*

As we understand appellee's argument, it is contended that because this court had before it the Wisconsin dividend tax law at the time of its decision in the *J. C. Penney Company* case (even though as of that time the Wisconsin

court had as yet no real occasion to specifically consider the matter), that the *J. C. Penney Company* case must be considered as conclusively foreclosing the contention that the law is unconstitutional as a tax on a stockholder of a foreign corporation. Appellee does not, nor could it, in view of the recent series of Wisconsin decisions, dispute the fact that the tax is a tax against the stockholder.

We challenge the assertion that the majority decision in the *J. C. Penney Company* case can be deemed to sustain the law as a tax against the stockholder. We submit that that decison does not assert any such revolutionary conclusion. A substantial portion of the majority opinion is spent in reaching a conclusion that the tax in substance is nothing more than a supplementary corporate income tax, a conclusion no longer possible in view of the construction given the law by the Wisconsin court. No attempt is made in the majority decision to justify the tax from a constitutional viewpoint as a tax against the stockholder.

Neither does the appellee cite *any* decisions of this court or of other courts (other than the *Penney* case) which it contends sustains the tax as a transaction tax levied on non-resident stockholders of a foreign corporation, where the transaction takes place outside of the state of Wisconsin and the stockholder resides outside of the state imposing the tax, solely because at some time in the past, the corporation may have received the protection of the state in earning certain of the income. Nor could such a result be reached except by complete and utter disregard of the corporate entity and by utterly disregarding all accepted concepts of the corporate entity in business transactions.

The security of business transaction, the regard of the common law for the corporate entity where its existence is used legitimately, should be protected.

This court only recently in an opinion by Mr. Justice Reed in *Moline Properties, Inc. vs. Commissioner of Internal Avenue*, 319 U. S. 436, 438, had occasion to consider the concept of corporate entity and its relation to other phases of the law and particularly to tax law. It was specifically recognized and assumed, as well it necessarily should have been, that the corporate entity where legitimately used has recognized usefulness in business life and should not be disregarded.

To hold that a state has jurisdiction to tax a foreign *stockholder* as such because the *corporation* has enjoyed certain benefits many years before from the state asserting the tax, is a wholly revolutionary concept and the conclusion can be reached only by completely disregarding the corporate entity. The least that could be said of such a conclusion is that it should not be based on mere inference from any language that the court rendered in the *J. C. Penney Company* case. We respectfully submit that the *J. C. Penney Company* case does not reach the conclusion which the appellee contends.

POINT II. If there is any conceivable basis on which the privilege dividend tax can be sustained jurisdictionally, it is a retroactive tax and a substantial federal question not present in the J. C. PENNEY COMPANY case exists. The Wisconsin Supreme Court was evenly divided on this question.

Appellee contends that appellant's position that the law is retroactive is inconsistent, in view of its argument that the law is unconstitutonal as a transaction tax on foreign stockholders of foreign corporations

The inconsistency, if such exists, was not initiated by the appellant,—it was initiated by the argument that Wis-

consin has jurisdiction to tax the stockholder of a foreign corporation merely because Wisconsin gave protection to the corporation in earning part of the income used to make up the dividend. There can be no question whatsoever but what the *only* jurisdictional basis upon which the law was sustained by this court in the *J. C. Penney Company* case was that Wisconsin could tax because it had given protection to the earning of income by the corporation. The earning of the corporation obviously took place only in the years in which the income was earned. If the only jurisdictional basis for "charging", so to speak, in the form of a tax, is the earning of the income, it seems almost too clear for argument that Wisconsin by attempting to "charge" for the earning of this income, earned many years prior to the enactment of the privilege dividend tax law, has imposed a prodigously retroactive tax.

This phase of the matter was not before this court in any manner whatsoever in the earlier *J. C. Penney Company* case, because at that stage of the proceedings, the tax had been levied pursuant to a statutory presumption that the dividends were paid out of income earned in the prior year, a presumption that the Wisconsin supreme court on remand held to have been rebutted. The tax was then recomputed as is reflected in the present record, by analyzing the surplus back to the date the corporation first did business in Wisconsin, to determine how much so-called Wisconsin income was in surplus as of December 31st prior to the date of the declaration of the dividend, — and upon declaration and payment of the dividend a tax was assessed against the stockholder on the ratio that such so-called Wisconsin income (regardless of when earned) bore to total surplus.

As pointed out in our Jurisdictional Statement, the decision of the Wisconsin supreme court on the constitutionali-

ty of this asserted retroactive phase of the tax was by an evenly divided court, — three of the Justices being of the opinion that the law was partially unconstitutional and three of the Justices being of the opinion that the law was not unconstitutionally retroactive. We requote from that part of the companion case of *International Harvester Company vs. Department of Taxation,* 243 Wis. 198 at 208, which expresses the view of Mr. Chief Justice Rosenberry and Mr. Justice Martin and Mr. Justice Wickhem who wrote the decision in that case. It is there said:

> "Mr. Chief Justice *Rosenberry,* Mr. Justice *Martin,* and the writer are of the view, (1) that since the United States supreme court has held that the label placed upon this law by the legislature or by this court is wholly ineffective to impair its constitutionality as against the contention that Wisconsin is without power to levy the tax, such label or designation or the selection by Wisconsin of the payment and receipt of the dividend as the occasion for the tax is equally ineffective to save it from objections to its retroactivity; (2) that the earnings of the corporation in Wisconsin upon which are grounded Wisconsin's power to levy the dividend tax must be within reach of a retroactive tax; (3) that the extent of permissible retroactivity should be determined upon the analogy of the income tax cases; (4) that retroactivity should only be permitted to 'recent' transactions; (5) that consistently with these principles the tax may not be applied to earnings in Wisconsin which accrued prior to the last corporate fiscal year preceding the enactment of Wisconsin privilege dividend tax; (6) that by reason of the severability clause, the operation of the tax should be so limited; (7) that nothing in the decision upon remand requires a different conclusion."

Appellee contends that the tax is no more retroactive than a tax on a capital gain in the year of sale of the asset. But no attempt is made under the federal or under the

Wisconsin income tax laws to impose a tax on any part of a capital gain which occurred *before* the enactment of the income tax law. The federal law accepts as the cost price for the determination of whether or not there is a capital gain or loss (as to an asset held at the date of enactment of the law) the fair market value as of March 1, 1913, the effective date of the law. In the instant case, by the use of the formula applied by the respondent, attempt is made to impose a tax for a privilege allegedly granted years before the enactment of the law so taxing it.

Respondent further argues that it is no more a retroactive tax than an income tax imposed upon a stockholder for corporate dividends received by him where the dividend was made up of surplus accumulated from prior years' income of the corporation. This would perhaps be true if the tax was an income tax on the *stockholder,* for the dividend is income to the stockholder in the year that he receives it. But such is not the instant case, — the Wisconsin supreme court on remand in the *J. C. Penney Company* case specifically holding that it was not an income tax, and asserting specifically that as an income tax on foreign stockholders the law would be unconstitutional under the Wisconsin constitution.

J. C. Penney Company vs. Tax Commission, 238 Wis. 69, at 72-73.

We submit that if the tax can jurisdictionally be justified only because Wisconsin gave protection in the earning of the income of the corporation (the only justification asserted by the majority opinion of this court) that inasmuch as in the nature of things such privilege or protection could be given only in the year in which the income was earned, to levy a charge for this protection years after it has been

ranted obviously results in an unconstitutionally retro-
ctive tax.

The conclusion reached by Mr. Chief Justice Rosen-
erry, Mr. Justice Martin and Mr. Justice Wickhem to the
nd that to levy a tax on Wisconsin earnings in surplus for
period beyond that of "recent" transactions renders so
nuch of the law as attempts to tax this protection prior to
hat time, unconstitutional, is obviously sound and is the
nly conclusion that honestly can be reached if the "ra-
ionale" of the majority opinion in the *Penney* case on jur-
sdiction to tax is adhered to.

CONCLUSION.

In conclusion we respectfully submit that the record in
his case clearly presents substantial federal questions on
he jurisdiction of Wisconsin to levy any tax, viewing the
aw as imposing a transaction tax on the stockholder. We
urther submit that in any event a substantial federal ques-
on is presented on the alleged unconstitutional retroac-
vity phase of the Wisconsin Privilege Dividend Tax law.

Respectfully submitted,

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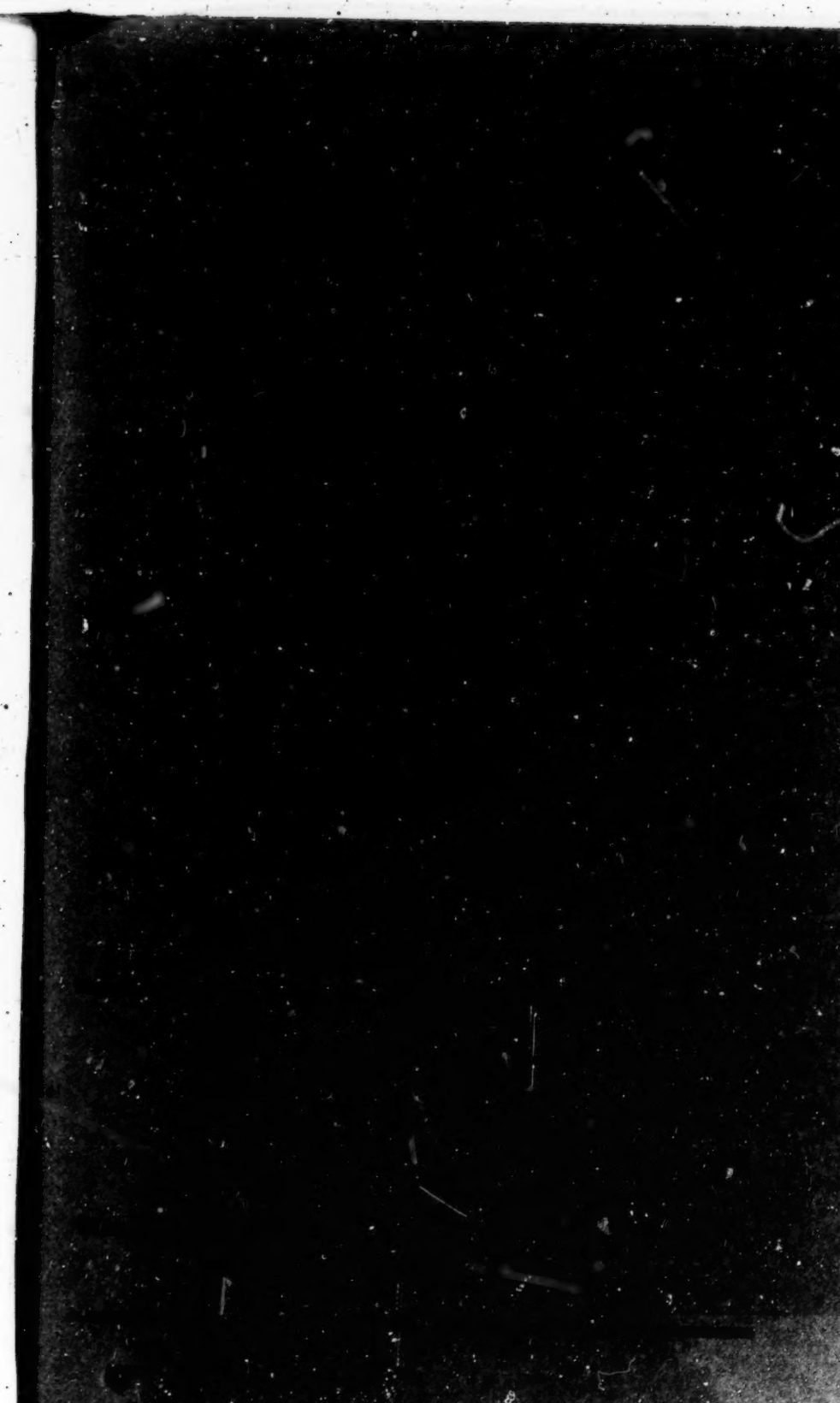

Subject Index.

AUTHORITIES.

Cases Cited:

Authorities—*Continued.*

Authorities—*Continued.*

Authorities—*Continued.*

Authorities—*Continued.*

In the Supreme Court of the United States

October Term, 1943 - - - - - - - Number 621

MINNESOTA MINING & MANUFACTURING COMPANY,

Appellant,

vs.

WISCONSIN DEPARTMENT OF TAXATION,

Appellee.

Brief of Minnesota Mining & Manufacturing Company, Appellant.

I.

The Opinions of the Court Below.

The opinion in the Supreme Court of Wisconsin filed June 16, 1943 is reported in 243 Wis. 211, 10 N. W. (2d) 174. It is also printed in the record at Page 102. The opinion of the same Court denying motion for rehearing filed September 14, 1943, is not yet officially reported but is reported in

11 N. W. (2d) 96. It is also printed in the record at Page 106.

An opinion in the companion case of *International Harvester Company vs. Wisconsin Department of Taxation*, which was adopted by way of reference in the decision of Wisconsin Supreme Court in the instant case is reported in 243 Wis. 198, 10 N. W. (2d) 169.

II.

Jurisdiction.

1. The jurisdiction of this Court is invoked under the provisions of Section 237 (a) of the Federal Judicial Code (28 U. S. C. A. 344 (a)). Appellant further relies on Rule 46, Paragraph 2 of the rules of this Court.

2. The petition for allowance of an appeal was made to review the judgment of the Supreme Court of the State of Wisconsin in the instant case, and with such petition there was filed appellant's "Statement as to Jurisdiction" as required by the rules of this Court. The appellee moved to dismiss the appeal or in the alternative to affirm for the want of a substantial Federal question and filed its "Statement Opposing Jurisdiction". The appellant filed a brief opposing appellee's motion. On February 28, 1944 this Court noted "Probable Jurisdiction."

3. The appellant seeks review of the judgment of the Supreme Court of the State of Wisconsin upon appeal to it with respect to the validity as applied to appellant of Section 3 of Chapter 505, Laws of Wisconsin, 1935, as amended by Chapter 552, Laws of Wisconsin, 1935, and subsequent acts amendatory thereto, and tax assessments levied against appellant under such laws. The appellant throughout the proceedings has challenged the validity of the law as applied to it, and the assessments of tax levied against it.

ntending that the law as applied in assessments against
e appellant imposes a tax beyond the taxing jurisdiction
f the State of Wisconsin, and therefore that the imposition
the tax as against the appellant by the assessments in-
lved, constitutes a deprivation of the property of appel-
nt and its stockholders without due process of law con-
ary to the provisions of the Fourteenth Amendment to
e Constitution of the United States. The appellant fur-
er throughout these proceedings has contended in the al-
rnative and does now contend that the assessments as
ade result in the imposition of a vulnerably retroactive
x and as such constitute a deprivation of appellant's prop-
ty without due process of law under the Fourteenth
mendment. The Supreme Court of the State of Wiscon-
n denied relief to appellant on both constitutional ques-
ons,—although on the retroactivity phase the determina-
on was by an evenly divided Court, resulting in affirm-
ce of the lower court's determination in favor of consti-
tionality. No procedural questions are involved on this
peal.

4. Reference is also made to appellant's Statement as Jurisdiction and Brief of Appellant Opposing Appellee's otion to Dismiss Appeal for a more comprehensive jur-dictional statement.

III.

Statement of the Case.

This case involves the validity of certain assessments ade against the appellant, Minnesota Mining & Manu-cturing Company, a Delaware corporation, for so-called isconsin privilege dividend taxes pursuant to Section 3 Chapter 505 of the Laws of 1935 as amended and as ex-nded by Chapter 309, Session Laws of 1937, and Chapter

198, Session Laws of 1939. This law is printed as an appendix to this brief.

The controversy at issue arose out of three separate assessments of so-called Wisconsin privilege dividend taxes under the laws above set forth.

In substance this law attempts to impose a tax of two and one-half per cent (2 1/2%) (three per cent (3%) after July 1, 1939) on the amount of dividends declared and paid by corporations, domestic and foreign, out of income derived from property located and business transacted in the State of Wisconsin. The law specifically provides that such tax shall be deducted and withheld from such dividends payable to resident and nonresident stockholders by the payor corporation. The corporation declaring the dividend is also made liable for the tax, but is required to deduct it from the dividends payable to the stockholders.

The basic facts in connection with the assessments are not in dispute. The appellant is a Delaware corporation with its principal office and place of business in St. Paul, Minnesota. Its only operations in Wisconsin is in connection with a factory at Wausau, Wisconsin, where it manufactures roofing granules. It commenced actual operations in Wisconsin in 1930 and was duly qualified as a foreign corporation. Sales are made of the products from the Wisconsin operations through a sales office in Chicago, Illinois. All of these orders are confirmed at the St. Paul office and shipping instructions forwarded from the St. Paul office (R. 77). When products so manufactured are sold, the remittances are made directly to the home office at St. Paul and funds from such sales are deposited in the bank account of the appellant. Payrolls are prepared in St. Paul and are drawn on a Wausau, Wisconsin bank and a deposit equaling the amount of the payroll is forwarded to the Wausau, Wisconsin bank from St. Paul to cover the checks approximately at the time the checks representing the payroll

are forwarded (R. 77). The appellant, as a foreign corporation, reports such income as is taxable to the state of Wisconsin for income tax purposes on a calendar year basis (R. 38). All dividends upon which the attempt to tax involved in this controversy were levied were declared by the board of directors of the company at meetings held at St. Paul, Minnesota. The transfer agent for shares of stock is the First Trust Company of St. Paul, Minnesota (R. 22, 23, 77). Dividends paid by the appellant during the whole period involved in controversy on this appeal were paid to the transfer agent in St. Paul by check drawn on the St. Paul bank, and distributed by such bank through the mails to company stockholders by the transfer agent; no directors' meetings have ever been held in the state of Wisconsin (R. 22, 77). Only a small percentage of the outstanding stock of the appellant is owned by Wisconsin residents (R. 23, 47). The record shows that dividends are not paid out of the earnings of the company for the year immediately preceding the payment of the dividend, but are rather paid out of the general funds of the corporation. The dividends in question were paid pursuant to Section 34 of the Delaware Corporation Law, which provides as follows:

> "The directors of every corporation created under this Chapter, subject to any restrictions contained in its Certificate of Incorporation, shall have power to declare and pay dividends upon the shares of its capital stock either (a) out of its net assets in excess of its capital as computed in accordance with the provisions of Section 14, 26, 27 and 28 of this Chapter, or (b) in case there shall be no such excess, out of its net profits for the fiscal year then current and/or the preceding fiscal year." (R. 79)

The dividends in question were pursuant to resolution of the board of directors declared and paid out of the surplus of the company (R. 39, 79).

Many stockholders in the company have only a small number of shares of stock and on the basis of the assessments as made a tax cannot be computed and withheld from the small stockholders in the exact amount thereof because the amount of tax would be a fractional amount of a cent (R. 30, 31). In making the assessments in question the Wisconsin Department of Taxation attempted to analyze the total surplus of the corporation on December 31st of the year preceding the year in which a particular dividend was paid, to ascertain how much Wisconsin income was in the surplus. In such alleged analysis, the Department analyzed surplus back to the date on which the corporation first commenced doing business in Wisconsin attempting to determine the total surplus at that time and then attempting to analyze from year to year the ratable contributions of earnings in Wisconsin to the surplus as of December 31st prior to the declaration of the dividend. It then determined the percentage of Wisconsin earnings in surplus to aggregate surplus and applied a fraction resulting from this ratio to total dividends paid by the corporation and taxed that portion of the dividend so allocated to Wisconsin (R. 8, 64-65, 68-69, 72A-73). The stock records of the company are maintained in Minnesota and Delaware and not in Wisconsin. The surplus of the company at the end of various years was invested in accounts, inventory, fixed assets, such as lands, buildings, machinery and equipment located in various states, and in cash (R. 32).

The Wisconsin Department of Taxation purporting to act under the Wisconsin privilege dividend tax law levied three separate additional assessments against the appellant as follows:

Dividends paid in the calendar year of 1936	$2,220.60
Dividends paid in the calendar year of 1937	3,037.75
Dividends paid in the calendar years of 1938, 1939 and 1940	9,307.08

(R. 64, 68, 72A)

Appropriate claims for abatement were filed with the Department of Taxation and denied. Thereafter, as provided by the laws of Wisconsin, the appellant petitioned the Wisconsin Board of Tax Appeals for review of assessments and reversal thereof. The matters were consolidated for hearing and a single record made up before the Board of Tax Appeals which affirmed the assessments so made, with modification of certain assessments, not material to the controversy in its present stage.

The appellant then appealed said determination of the Board of Tax Appeals to the Circuit Court for Dane County, Wisconsin (R. 83-97), and that court affirmed the decision and order of the Board of Tax Appeals (R. 99-100).

The appellant appealed from this decision and judgment of the Circuit Court for Dane County to the Supreme Court for the State of Wisconsin, the court of last resort in Wisconsin, and it affirmed the judgment so delivered. On the issue of whether a portion of the law was unconstitutional under the Fourteenth Amendment to the Constitution of the United States as being vulnerably retroactive and as such taking the property of the appellant and its stockholders without due process of law, the Supreme Court of the State of Wisconsin was evenly divided—three justices being of the opinion that the law was unconstitutional to the extent that it imposed a vulnerably retroactive tax, the other three justices being of the opinion that the law was constitutional in this respect.

Throughout all of these proceedings, the appellant has challenged the validity of the law as applied to dividends paid by it and particularly has it challenged the law and the tax assessments thereunder as applied to dividends paid by it on the ground that it takes its property and the property of the stockholders of the appellant without due process of law and in contravention to the Fourteenth Amendment of the United States because it imposes a tax beyond the taxing jurisdiction of the state of Wisconsin.

Appellant throughout the proceedings has further challenged the validity of the law as applied to it and its stockholders so far as it purports to reach the alleged Wisconsin income purportedly included in the payment of the dividend *regardless of when earned,* it being contended that in any event to the extent that the law and the purported tax attempts to reach so-called Wisconsin income in surplus for many years prior to the enactment of the law in 1935, that such law and tax takes the property of the appellant and its stockholders without due process of law and in contravention to the Fourteenth Amendment of the United States.

The Wisconsin Supreme Court in its decision in the instant case specifically ruled upon the constitutional questions so raised by the appellant, but denied it the relief prayed for although as hereinbefore pointed out on the constitutional retroactivity phase of the matter, the Wisconsin Supreme Court was evenly divided.

It is from this decision and judgment of the Wisconsin Supreme Court that the appellant has appealed.

IV.

Specifications of Error.

1. The Supreme Court of Wisconsin erred in failing to hold that Section 3, Chapter 505, Wisconsin Session Laws, 1935, as amended by Chapter 552, Wisconsin Session Laws, 1935, and as extended in operation by Chapter 309, Wisconsin Session Laws, 1937, and Chapter 198 of Wisconsin Session Laws, 1939, as applied to Minnesota Mining & Manufacturing Company and its stockholders under the existing facts was invalid as in conflict with the Fourteenth Amendment to the Constitution of the United States of America as imposing a tax beyond the taxing jurisdiction of the State of Wisconsin.

2. The Supreme Court of Wisconsin erred in failing to hold that the assessment of taxes involved in this proceeding pursuant to the provisions of Section 3, Chapter 505, Wisconsin Session Laws, 1935, as amended by Chapter 552, Wisconsin Session Laws, 1935 and as extended in operation by Chapter 309, Wisconsin Session Laws, 1937, and Chapter 198 of Wisconsin Session Laws, 1939, against the Minnesota Mining & Manufacturing Company, a Delaware corporation, under the existing facts, constituted a deprivation of property of Minnesota Mining & Manufacturing Company and its stockholders without due process of law and beyond the taxing power of the State of Wisconsin and therefore invalid as violative to the Fourteenth Amendment to the Constitution of the United States of America.

3. The Supreme Court of Wisconsin erred in failing to hold (split decision of State Supreme Court three to three which by rule of Wisconsin Supreme Court affirmed the trial court's decision) that Section 3, Chapter 505, Wisconsin Session Laws, 1935, (as amended by Chapter 552, Wisconsin Session Laws, 1935), and as extended in operation by Chapter 309, Wisconsin Session Laws, 1937, and Chapter 198 of Wisconsin Session Laws, 1939, so far as it purports to reach Wisconsin earnings of Minnesota Mining & Manufacturing Company without reference to the year in which they were earned, and for many years prior to the enactment of the law and from the time the corporation first operated in Wisconsin, are invalid as depriving the Minnesota Mining & Manufacturing Company and its stockholders of property without due process of law and therefore to this extent invalid as violative of the Fourteenth Amendment to the Constitution of the United States.

V.

ARGUMENT.

Summary of Argument.

POINT 1: The Wisconsin privilege dividend tax law has now been definitely and finally construed by the Wisconsin Supreme Court as a privilege tax upon the stockholder, and not as an income tax upon the corporation. (*J. C. Penney Company vs. Tax Commission* (on remand), 238 Wis. 69, 73; *Blied vs. Wisconsin Foundry and Machine Co.*, 243 Wis. 221, 10 N. W. (2d) 142; *Wisconsin Gas and Electric Company vs. Department of Taxation*, 243 Wis. 216, 10 N. W. (2d) 140.) The majority decision of this Court in *State of Wisconsin vs. J. C. Penney Company*, 311 U. S. 435, 61 Sup. Ct. 246, 85 L. Ed. 267, which sustained the constitutionality of the law, was rendered before the Wisconsin Court had determined that the incidence of the tax was on the stockholder, it having at that time merely characterized the tax as a privilege tax. The majority opinion of this Court in the *Penney* case sustaining the law as constitutional only as a supplementary income tax on the corporation is not authority to support the constitutionality of the law as a privilege tax against a stockholder. Accordingly the whole foundation and basis on which constitutional justification for the law and tax was predicated in the *Penney* case has now been removed. The determination of the State Court that the incidence of the tax is on the stockholder and not on the corporation is binding on this Court. (*Federal Land Bank vs. Bismarck Lumber Co.*, 314 U. S. 95, 99, 62 Sup. Ct. 1; *Alabama vs. King and Booser*, 314 U. S. 1, 9, 10, 62 Sup. Ct. 43; *Colorado Bank vs. Bedford*, 310 U. S. 41, 52, 60 Sup. Ct. 800.) The mere fact that the construction now given to the law by the Wisconsin Supreme Court is contrary to that made in the majority decision in this Court in the *Penney* case before the Wisconsin

Court had decided upon whom the incidence of the tax rested, is immaterial, inasmuch as at that time the law not having been fully construed by the State Court, this Court had some latitude in construing the law. (*Meredith vs. Winter Haven,* 320 U. S. 228.) The law now having been finally and unequivocally construed by the Supreme Court of Wisconsin, this Court is bound to accept the law with the construction so given it by the Supreme Court of Wisconsin as a privilege tax upon the stockholder. (*Green vs. Neal's Lessee,* 6 Peters 291.) The construction now finally given the law by the Wisconsin Supreme Court is substantively different than the construction given the law by this Court in the *Penney* case and is not merely a difference in form. Furthermore, this Court under all the circumstances of this case is bound and required to accept the law as drawn by the Legislature and as construed by the Wisconsin Court and is not at liberty to reshape it to a form where it might constitutionally accomplish the same result. (*Oklahoma vs. Wells Fargo & Co.*, 222 U. S. 298, 302; *Home Savings Bank vs. Des Moines,* 205 U. S. 503, 519; *Chanler vs. Kelsey,* 205 U. S. 466, 482.) Accordingly the law must be accepted as a privilege tax upon the stockholder.

POINT 2: As a privilege tax on a foreign stockholder of a foreign corporation declaring and paying dividends outside the State of Wisconsin, the law as applied to appellant and its stockholders is clearly unconstitutional under the Fourteenth Amendment of the United States as taking property without due process of law.

If Wisconsin may not constitutionally directly impose its income tax upon income payable to nonresident stockholders of a foreign corporation, it is *a fortiori* clearly unconstitutional for it to impose a tax upon such stockholders at the time of a payment of a dividend to the stockholders which the corporation is required to deduct.

The privilege of earning income in the State of Wisconsin by the corporation is entirely separate and distinct from the privilege of receiving a dividend out of income in the surplus account. The privilege of earning the income of the corporation in Wisconsin is a privilege granted to the corporation that can be taxed and has been taxed against the corporation under the general income tax laws. The privilege of declaring and paying the dividend and the privilege of devolving the income earned in Wisconsin in prior years to stockholders of a foreign corporation is a privilege neither conferred nor controlled by Wisconsin and may not be taxed by it. (*Provident Savings Life Assurance Society vs. Kentucky*, 239 U. S. 103, 111, 113; *Connecticut General Life Insurance Co. vs. Johnson*, 303 U. S. 77, 58 Sup. Ct. 436.)

The law and tax cannot be sustained against the stockholders of a foreign corporation merely because the foreign corporation has enjoyed certain privileges in Wisconsin (which privileges have already been taxed), without unwarranted and complete disregard of the corporate entity which has been legitimately exercised. There is no principle of justice which requires the disregard of the corporate entity in order to sustain the dividend tax. (*New Colonial Ice Co. vs. Helvering*, 292 U. S. 435.) The general income tax under the laws of Wisconsin has been imposed upon the corporation based upon the conception of the appellant as a separate entity, and after such imposition the State of Wisconsin should not be allowed to disregard the corporate entity for the purpose of sustaining the privilege dividend tax against the stockholder.

POINT 3: In the event it is determined that Wisconsin had jurisdiction to levy any tax on the foreign stockholder of a foreign corporation on the ground that Wisconsin gave protection to the corporation in earning the income used in such dividend—then so much of the law as attempts to tax

he earnings in surplus which had accumulated prior to the enactment of the law is unconstitutional under the Fourteenth Amendment as being vulnerably retroactive. The only jurisdictional basis ever urged to support the law and tax is because of the protection which Wisconsin gave to the earning of the income. Such protection can, in the nature of things, be given only in the year in which the income is earned. Under the formula used by the Wisconsin Department of Taxation in levying the tax, all so-called "income" from Wisconsin in surplus *regardless of when earned* is subject to the tax. To "charge" by way of tax, for the privilege Wisconsin gave to the corporation in the earning of income years before the enactment of the tax law, results in a tax so vulnerably retroactive as to result in the taking of the property of the appellant and its stockholders without due process of law.

Preface Reflecting Present Status of the Constitutional Aspects of Wisconsin Privilege Dividend Tax.

An orderly presentation of the issues involved on this appeal requires as a background a summarization of certain proceedings heretofore had in this Court and in the Wisconsin Supreme Court which involved certain phases of the Wisconsin privilege dividend tax law.

Certain phases of the Wisconsin privilege dividend tax law have heretofore been before this Court in the cases of *State of Wisconsin vs. J. C. Penney Co.*, 311 U. S. 435, 61 Sup. Ct. 246; *State of Wisconsin vs. Minnesota Mining & Manufacturing Co.*, 311 U. S. 452, 61 Sup. Ct. 253; and *State of Wisconsin vs. F. W. Woolworth Co.*, 311 U. S. 522, 61 Sup. Ct. 395.

Those cases involved a review of a determination of the Supreme Court of the State of Wisconsin which found the Wisconsin privilege dividend tax law as applied to foreign

corporations unconstitutional under the Fourteenth Amendment of the Constitution of the United States. This Court by a five (5) to four (4) decision—Chief Justice Hughes, Mr. Justice McReynolds, Mr. Justice Roberts and Mr. Justice Reed, dissenting—reversed the Wisconsin Supreme Court, the majority of the Court speaking through Mr. Justice Frankfurter, holding that the practical operation of the law and tax was to impose an additional income tax on corporate income when paid out, and holding that the fact that the Wisconsin Supreme Court had "labeled" the law a tax on the privilege of declaring dividends rather than as a supplementary income tax on the corporation did not vitiate the tax, and that Wisconsin had the power to levy such a supplementary income tax on the corporation because it had given protection to the earning of the income (*State of Wisconsin vs. J. C. Penney Co.*, 311 U. S. 435 at 444.) The dissenting division of the Court, however, challenged the construction of the law given in the majority opinion and insisted that the tax was strictly an excise tax and that the tax was a tax against stockholders and as such was clearly invalid under the Fourteenth Amendment to the Constitution of the United States as to a foreign corporation. We submit that it is apparent from a reading of the decision, that the majority opinion assumed that if the tax was a tax against the stockholder it could not be sustained. It seems further apparent that the controversy between the majority and minority divisions of this Court was based primarily upon a difference of opinion as to a proper construction of the law rather than upon the application of constitutional concepts.

The taxes involved in the litigation heretofore before this Court had been assessed against the corporations, by the application of a statutory presumption that dividends of a foreign corporation were presumed to have been paid

out of earnings of the company attributable to Wisconsin under the general income tax statute for the year immediately preceding the declaration of the dividend in the absence of proof to the contrary. (See Sub-Section 4 of Section 3, Chapter 505, Laws of 1935.) This Court in the *J. C. Penney Company* case, *Minnesota Mining and Manufacturing Company* case, and *F. W. Woolworth Company* case remanded the cases to the Supreme Court of Wisconsin for the determination of such questions as were open in light of the opinion so rendered by this Court (*State of Wisconsin vs. J. C. Penney Co.*, 311 U. S. 435, 446).

The Wisconsin Supreme Court on remand (*J. C. Penney Co. vs. Tax Commission* and companion cases, 238 Wis. 69) held and determined that the statutory presumption on which the taxes were assessed in those cases had been erroneously applied because all of the litigants had paid the dividends out of surplus and this circumstance rebutted the statutory presumption that the dividends were paid out of the prior year's earnings. The Wisconsin Supreme Court accordingly remanded the litigation to the Tax Commissioner for further computation of the tax.

On remand the Wisconsin Supreme Court vehemently denied that the tax was an income tax on the corporation as indicated by the majority decision of this Court in the *Penney* case and postulated that if it was an income tax, it was an income tax on the stockholder and as to a non-resident stockholder, void under the Wisconsin constitution.

The tax against the Minnesota Mining & Manufacturing Company involved in the prior litigation involved only a tax on the dividends paid by that company in the calendar year of 1936, and the tax for that year has now been computed on an entirely different basis (so-called surplus analysis basis, instead of statutory presumption basis as originally).

Because on remand, the Wisconsin Supreme Court reversed its decision with directions to remand each case to the Tax Commissioner because of incorrect computation, the taxpayer litigants there involved, inasmuch as such determination was not *final*, had no right or opportunity to appeal from the decision of the Court on remand to this Court to urge that Mr. Justice Frankfurter's construction of the law was erroneous, or at least that the Wisconsin Court had subsequently construed the law to place the incidence of the tax on the stockholder, otherwise than as construed by this Court in the *Penney* case, and inasmuch as the decision on the Federal constitutional question was predicated solely on a construction of the law as a supplementary corporate income tax, that a different result should be reached. It should here be said however in justification of Mr. Justice Frankfurter's approach to the matter, that at the time of the decision of this Court in the *J. C. Penney* case the Wisconsin Court had not determined the incidence of the tax. It had to a certain extent characterized the tax as a transaction tax, but it had not at that time, as it has today, unqualifiedly construed the incidence of the tax to be upon the stockholder as distinct from the corporation.

It is unqualifiedly clear, however, that on the decision on remand and in a series of subsequent cases, the Supreme Court of Wisconsin by its construction of the law has removed the basis on which this Court upheld the law and tax in the *Penney* case, by denying a construction to the law which made it an income tax against the corporation.

In short, a basic conflict in the construction of the law existed between that given it by the majority of this Court speaking through Mr. Justice Frankfurter, and that given it in the dissenting opinion of this Court and by the Wisconsin Supreme Court on remand and in later cases.

Judge Alvin C. Reis of the Circuit Court for Dane County, in his decision in the companion case of *International Harvester Company vs. Wisconsin Department of Taxation,* No. 620, October 1943 term, has succinctly, forcefully, and accurately analyzed this basic conflict as follows:

"We agree with counsel for the International Harvester Company that an immaculate dilemma has been created.

In the first Penney case the Supreme Court held the tax to be a transaction tax or tax on 'privilege', as in terms it so states; and since the transaction happened and the privilege was exercised outside of Wisconsin, in the case of a foreign corporation such as this one, the Wisconsin court held the tax unconstitutional, being violative of due process.

When however this case reached the Supreme Court of the United States, the tribunal regarded this tax as a 'supplementary income tax' upon the corporation and hence clearly within the power of the state to impose and not infringing upon the fourteenth amendment.

In the third and final round of the battle thus far, i.e., remand from the United States Supreme Court to the Wisconsin court, our local court followed the United States Supreme Court upon the issue of constitutionality *because it had to do so.*. That pithes a delicate point rather abruptly but no one will question the accuracy of our assertion.

The Supreme Court of Wisconsin however, in this last decision, refused to recede from its former position that this was an excise or privilege tax. It militantly maintained that it was its right, and its alone, to say what this tax was; and that such was not the province of the Supreme Court of the United States. And thereupon and in the face of the highest federal court declaration that the tax here involved was a 'supplementary income tax' upon the corporation, the Wisconsin court unequivocally declared: *"In no sense and to no extent whatever, is it a tax upon the income of the corporation."* (Our italics.)

(J. C. Penney Company vs. Tax Commission, 238 Wis. 69, 73.)

We can not settle this dispute. That rests far beyond our hands.

The Wisconsin court insists that the tax is a transaction tax, which under the Federal constitution makes it unconstitutional because based on out-of-state transactions. But the United States court majority opinion disregards it as a transaction tax and sets the tax up as an additional corporate income tax, the validity of which is obvious.

The Supreme Court of Wisconsin, as noted, however, will not accept it as an income tax on the corporation. Furthermore, it postulates that if it is an income tax on individuals, it is unconstitutional *under the state constitution*, because the individuals are beyond the jurisdiction of Wisconsin to tax.

"It is perfectly true that the tax cannot be sustained as an income tax under the law of this state." —Thus spoke our own Supreme Court.

J. C. Penney Company vs. Tax Commission, 23 Wis. 69, 72.)

Therefore, as an income levy, the tax is completely *persona non grata* in this state,—an unwanted black sheep in the Wisconsin court's backyard.

Here then is the deadlock: If the tax is a transaction tax, as Wisconsin's court says it is, then it is void under the *Federal* constitution; and the federal court should so hold it. If on the other hand it is an income tax, it can be an income tax only on individuals, according to the Wisconsin court, and then it becomes void under the state constitution; and the state court should so hold it." (R-50 et. seq.—Int. Harvester case.)

A comparison of the language in the majority opinion of this Court and of the dissenting opinion of this Court and of the language of the Wisconsin court on remand and in later cases illustrates clearly and graphically this basic conflict of construction, and also makes it readily apparent that the privilege dividend tax was upheld in this Court only as a supplementary corporate income tax:

See Folded Insert — Opposite This Page.

Mr. Justice Frankfurter's Opinion, Penney Case (61 S. Ct. 248):

"The practical operation of this legislation is to impose an additional tax on corporate earnings within Wisconsin but to postpone the liability for this tax until such earnings are paid out in dividends."

* * *

(P. 249)

"* * * by the privilege dividend tax of 1935 Wisconsin superimposed upon this income tax a tax upon corporate income that is paid out."

* * *

"The case thus reduces itself to the inquiry whether Wisconsin has transgressed its taxing power because its supreme court has described the practical result of the exertion of that power by one legal formula rather than another—has labeled it a tax on the privilege of declaring dividend **rather than a supplementary income tax."**

In Minn. Mining & Mfg. Co. Case (311 U. S. 452, 453):

"But it is too late in the day to find offense to that Clause because a state tax **is imposed on corporate net income**

Mr. Justice Robert's Dissent, Penney Case (61 S. Ct. 251):

"It is said that the challenged exaction is merely an additional income tax—this notwithstanding that the tax is not called an income tax, has been held by the highest court of Wisconsin not to be an income tax but an excise tax upon a privilege. * * *"

* * *

(P. 252)

"By the very terms of the Act the tax is laid not on the corporation, but on the stockholders receiving the dividend, and, by confession, thousands of stockholders are not residents of Wisconsin."

* * *

(P. 252)

"We are now told that this is not a fair exposition of the law, but that on the contrary and in the teeth of the known facts what **Wisconsin did was to lay a supplementary income tax upon foreign corporations."**

Chief Justice Rosenberry's Opinion, Penney Case on remand (238 Wis. 69 at 73):

"In no sense and to no extent whatever is it a tax upon the income of the corporation."

* * *

(238 Wis. 69 at 73)

"There is no provision in the Wisconsin statute for taxing disbursements as income. The income of the corporation was taxed by the state when it was received. If the State sought to tax the corporate income at a higher rate, all that it was required to do was to increase the rate."

(238 Wis. 69 at 72)

"If there has been a shifting of labels in this case, it was not done by this court. It is perfectly true that the tax cannot be sustained as an income tax."

Mr. Justice Wickhem, Wis. Gas. & Elec. Co. vs. Dept. of Taxation (243 Wis. 216, 220):

"The real question in this case is: On whom is the actual burden of this tax laid? This question can have but one answer. The statute specifically puts it upon the stockholder."

* * *

(243 Wis. 216, 224)

"We are certain * * *: (1) That the burden of the tax is specifically laid upon the stockholder."

Mr. Justice Wickhem, Blied vs. Wis. Fndry. & Mach Co. (243 Wis. 221, 223):

"The decision in Wis. Gas & Elec. Co. vs. Dept. of Taxation * * * requires that the judgment in this case be affirmed **since the specific** requirements of the statute which we hold to be valid are that the tax be withheld and deducted from the dividend payable to a stockholder."

The present status of the litigation is also reflected in an article in 28 *Marquette Law Review*, page 23, "Wisconsin Privilege Dividend Tax" by William Smith Malloy.

In short the conclusion is inescapable that when the matter was before this Court in the *Penney* case the law was held to be a supplementary *income* tax on the *corporation*,—whereas it has now been unequivocally determined by the Wisconsin Supreme Court to be a *privilege* tax upon the *stockholder*.

Point I: **The law as now authoritatively construed by the Wisconsin Supreme Court places the incidence of the tax on the stockholder and not on the corporation. Accordingly, the decision of this Court in the case of *Wisconsin vs. J. C. Penney Co.*, 311 U. S. 435, is not decisive of the present controversy.**

As indicated in the preface to this brief, as a result of a series of recent decisions of the Wisconsin Supreme Court, the issues now confronting this Court on the constitutional problems of this case are essentially different from those presented at the time that the constitutionality of the Wisconsin privilege dividend tax law was originally considered in *Wisconsin vs. J. C. Penney Co.*, 311 U. S. 435.

(a) There can be no question but what the law as now construed by the Supreme Court of Wisconsin imposes a privilege tax upon the stockholder, and not upon the corporation.

We assert dogmatically that there is and can be *no question* but what the Wisconsin Supreme Court has now *construed* the law in question as *a privilege tax upon the stockholder*, and has specifically negatived the tax as an income tax or as a tax of any kind or nature against the cor-

poration. *This construction given the tax law is not a matter of "labels", — it is one of basic substance.* From it we find the operating incidence of the tax and as stated by Mr. Justice Frankfurter in the *J. C. Penney* case *supra*, at page 444:

> "* * * For constitutional purposes, the decisive issue turns on the operating incidence of a challenged tax."

In the preface of this brief, we have attempted to point out in a more or less summary manner, the status of the litigation in this Court and in the Wisconsin Supreme Court, as it has affected a determination of the incidence of the tax created by the law under consideration.

At the time this Court had before it the case of *J. C. Penney Co. supra*, the Wisconsin court had not specifically determined the incidence of the tax to be upon the stockholder. It had *"characterized"* the tax as a transaction tax. It appeared from the statute that the operating incidence of the tax was against the stockholder and not against the corporation, but at that time the Wisconsin court had had no occasion to specifically construe the law in this respect.

Since the decision by this Court in the *J. C. Penney Co.* case, *supra*, however the Wisconsin court has unequivocally determined the incidence of the tax to be upon the stockholder, and has specifically negatived the incidence being upon the corporation.

In the opinion of the Wisconsin Supreme Court on remand in the case of *J. C. Penney Co. vs. Tax Commission*, 238 Wis. 69, it immediately became apparent that the Wisconsin court refused to accede to a construction of the statute as an income tax of any kind or nature, and further specifically refused to accede to a construction that the law imposed a tax upon the corporation. In the course of the

opinion in that case by Chief Justice Rosenberry he said, among other things, at pages 72 and 73:

> " * * * *If there has been a shifting of labels in this case, it was not done by this court. It is perfectly true that the tax cannot be sustained as an income tax under the law of this state.* Under our constitutional amendment authorizing the levying of an income tax, sec. 1, art. VIII, Const., it has been consistently held that an income tax is a burden laid upon the recipient of an income and the amount of the tax is measured by the amount of the income. *State ex rel. Sallie F. Moon Co. vs. Wis. Tax Comm.* (1917), 166 Wis. 287, 163 N. W. 639, 165 N. W. 470. Under its laws this state cannot and it does not undertake to tax the income of citizens of other states who are not doing business in this state. Under the terms of the statute under consideration no tax is levied until a dividend is declared. When the dividend is declared the dividend belongs to the stockholder. It is a debt of the corporation for the recovery of which the stockholder may maintain an action. Inasmuch as the tax cannot be levied until the dividend is declared if it is not a tax on the privilege of declaring and receiving a dividend as we hold it to be, then it must be a tax on the recipient, a person not engaged in doing business in this state nor a resident thereof. *In no sense and to no extent whatever, is it a tax upon the income of the corporation.*" (Italics ours)

He further said at page 73:

> " * * * There is no provision in the Wisconsin statutes for taxing disbursements as income. The income of the corporation was taxed by the state when it was received. If the state sought to tax the corporate income at higher rate, all that it was required to do was to increase the rate."

While the decision of the Wisconsin Supreme Court on remand quite conclusively negatived the tax law as an income tax or a tax of any kind or nature against the corporation, a subsequent series of cases even more clearly

and conclusively eliminates any doubt whatsoever about the matter and specifically hold that the incidence of the tax created by the law is upon the stockholder and not the corporation.

In the case of *Wisconsin Gas & Electric Co. vs. Department of Taxation*, 243 Wis. 216, 10 N. W. (2d) 140,—it was contended that a corporation could claim a deduction from gross income for Wisconsin income tax purposes of amounts paid for Wisconsin privilege dividend taxes, among other reasons because this Court in the *Penney* case had decided the tax to be upon the corporation. The Wisconsin Supreme Court however denied the corporation the right to deduct the tax, holding that it was a tax not on the corporation, but upon the stockholder, and in the course of the Wisconsin court's opinion Mr. Justice Wickhem stated at page 219 et seq. as follows:

> "* * * *The real question in this case is: On whom is the actual burden of this tax laid? This question can have but one answer. The statute specifically puts it upon the stockholder.* The corporation is directed to deduct the tax from the dividends, and if it does as it is required to do, it sustains no expense and consequently may not, in any event, deduct the tax from its gross income."

Further, at page 220 the Court said:

> "* * * *We are certain* of three things: (1) *That the burden of the tax is specifically laid upon the stockholder;* (2) that the corporation declaring the dividend must deduct the tax from the dividend and may not under any circumstances treat the tax as a necessary expense of doing business; (3) that the power to levy the tax so construed was authoritatively established in the *Penney* case, *supra.*" (Italics ours)

And, even more specifically did the Wisconsin Supreme Court hold the tax to be solely upon the stockholder and not on the corporation in the case of *Blied vs. Wisconsin Foun-*

dry and Machine Co., 243 Wis. 221, 10 N. W. (2d) 142. In that case a preferred stockholder brought suit against the corporation to recover a deduction that the corporation had made from the preferred stockholder's dividend for the purpose of paying the Wisconsin privilege dividend tax. The contention was made by the stockholder that this Court in the *Penney* case had construed the tax as one on the corporate earnings and the corporation alone was made liable for the tax and penalties and interest for failing to pay it, and that there was no personal liability created in the tax act upon the stockholder, and that accordingly the tax was upon the corporation and not upon the stockholder. The Wisconsin Supreme Court however on the authority of the *Wisconsin Gas and Electric Company* case, *supra*, denied recovery to the preferred stockholder of the tax so deducted:

> "* * * since the specific requirements of the statute which we hold to be valid are that the tax be withheld and deducted from the dividend payable to a stockholder." (243 Wis. 221, 223)

As indicated the construction given to the law by the Wisconsin Supreme Court is basically and substantively different from that given the law by this Court in the *Penney* case. This difference is not one of form or of "characterization". A deliberate determination of the incidence of the tax has been made by the Wisconsin Supreme Court as being upon the stockholder.

(b) This Court under the circumstances of this case is clearly bound by the construction given the law by the Supreme Court of Wisconsin.

It is of course a fundamental principle of law that a State court is the final authority in the matter of construction of state laws. This is equally true where the issue is as

to the incidence of a particular tax imposed by state law. This recognized basic principle of law has been reiterated by members of the present Court only recently on several occasions.

Mr. Chief Justice Stone in considering the incidence of a sales tax for constitutional purposes in the case of *State of Alabama vs. King and Boozer*, 314 U. S. 1, at pages 9 and 10 said:

> " * * * Who, in any particular transaction like the present is a 'purchaser' within the meaning of the statute, is a question of state law on which only the Supreme Court of Alabama can speak with final authority."

And Mr. Justice Murphy in considering the incidence of a sales tax for constitutional purposes in the case of *Federal Land Bank vs. Bismarck Lumber Co.*, 314 U. S. 95, at page 99 said:

> "The Supreme Court of North Dakota has held that the sales tax is laid on the purchaser. *Jewel Tea Co. vs. State Tax Commissioner*, 70 N. D. 229, 293 N. W. 386. This holding was reaffirmed in the decision below. These determinations of the incidence of the tax by the state court are controlling, and respondents concede the point."

And, Mr. Justice Reed in the case of *Colorado National Bank vs. Bedford*, 310 U. S. 41, which involved the matter of incidence of a particular state tax said at page 52:

> "The person liable for the tax, primarily, cannot always be said to be the real taxpayer. The taxpayer is the person ultimately liable for the tax itself. The funds which were received by the state came from the assets of the user, and not from the federal instrumentality, the bank. The Colorado Supreme Court holds the user as the taxpayer. The determination of the state court as to the incidence of the tax has great weight with us and, when it follows logically the language of the act, as here, is controlling."

Citations in support of the above principle of law could be multiplied almost indefinitely, a few of the leading cases being as follows:

The Commercial Bank of Cincinnati vs. Buckingham's Executors, 5 How. 317, 343, 12 L. Ed. 169 (1847);

Hotel and R. E. Int. A. vs. Wis. E. R. Bd., 315 U. S. 437, 440-441 (1942);

Brinkerhoff-Faris Trust and Sav. Co. vs. Hill, 281 U. S. 673, 74 L. Ed. 1107 (1930);

Phoenix Ins. Co. vs. Gardiner, 78 U. S. 204, 206, 20 L. Ed. 112;

Montreal ex rel Pearson vs. Probate Court, 309 U. S. 270, 273, 84 L. Ed. 744;

Rawlins vs. Georgia, 201 U. S. 638, 639, 50 L. Ed. 899.

There is a qualification to the rule herein cited not applicable to the present state of the controversy.*

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* Although not expressly called such, there appears to be a well established qualification to the rule above noted, to the effect that the United States Supreme Court has the power to disregard the characterization placed upon a statute by a state court of last resort, when it finds that the true meaning of a statute is such as to **encroach upon the federal constitution**: **Federal Land Bank vs. Crosland**, 261 U. S. 374; **Carpenter vs. Shaw**, 280 U. S. 363; **St. Louis Compress Co. vs. Arkansas**; 260 U. S. 346; **Macallen Co. vs. Massachusetts**, 279 U. S. 620; **Hanover Fire Ins. Co. vs. Carr**, 272 U. S. 494, 509. It seems quite apparent that this limited power given to this Court to construe a statute (except in instances where the statute has not already been construed by the state court), arises **only** from the duty of this Court **to prevent encroachment** by the States upon the federal constitution. It is an incident, and can only be exercised as an incident, of the power to prevent encroachment on the federal constitution. **(Truax vs. Corrigan**, 257 U. S. 312, 324).

(Footnote continued on page 26)

Another accepted rule in testing the constitutionality of a statute is that this Court is required to accept a tax law as drawn by the legislative body enacting it and is not at liberty to sustain a law by reshaping it to a form where it *might* constitutionally accomplish substantially the same result.

This rule was succinctly stated and recognized by Mr. Justice Holmes in *Oklahoma vs. Wells Fargo and Co.*, 222 U. S. 298 at 302 where the learned justice said:

> "Neither the court below, nor this court can reshape the statute simply because it embraces elements it might have reached if it had been drawn with a different measure and intent."

And this Court in *Home Savings Bank vs. Des Moines*, 205 U. S. 503 at 519 said:

> "If the State has not the power to levy this tax, we will not inquire whether another tax which it might lawfully impose would have the same ultimate incidence. Precisely the same argument was made and rejected in *Owensboro National Bank vs. Owensboro*, 173 U. S. 164."

And the rule is further recognized by Mr. Justice Holmes, with whom Mr. Justice Moody concurred in a dis-

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Historically, the function of this Court has been to defend the rights of the people guaranteed by the federal constitution from encroachment by the states. Indeed, not until December 23, 1914, (38 Stat. 790) was a review from a decision of a state court upholding a constitutional right even allowed. (See Frankfurter, 39 Harvard Law Review 1046, 1049-1057). Even now such review is allowed only by certiorari, whereas an appeal lies of right where the constitutional guarantee has not been sustained. In any event this so-called qualification to the general rule that this Court is bound by the construction given a law by the state court is not applicable in the instant case since the state court has now clearly "construed" the law and has not merely characterized the law.

nting opinion in *Chanler vs. Kelsey*, 205 U. S. 466 at page 2, where it is said:

> "And I also repeat that it has no bearing upon the matter that by a different law the state might have derived an equal revenue from these donees in the form of a tax."

The above rules must be respected in the instant case. his Court being bound by the construction of the law as ven it by the state court neither has the right to consider s constitutionality as a supplementary corporate income x nor indeed as any other tax against the corporation, but lely as a privilege tax against the stockholders.

Because the legislature might have enacted a law which ould be constitutionally valid (i.e. a supplementary corrate income tax) does not justify this court in sustaining e instant law on the ground that it might have been ented in a different form under which it would have proced the same amount of revenue.

Even were this Court free to construe the law and the cidence of the tax as an original proposition, we submit at notwithstanding the construction which the majority ecision gave the law in the *Penney* case,— the law itself early places the incidence of the tax on the stockholder, d were the matter open for the determination of this ourt, that so much of the decision in the *Penney* case as nstrued the law as a tax against the corporation should reconsidered and corrected. As Mr. Justice Frankfurter id in *Helvering vs. Hallock*, 309 U. S. 106 at page 121:

> "This Court, unlike the House of Lords, has from the beginning rejected a doctrine of disability at self-correction."

(c) This Court in the case of Wisconsin vs. J. C. Penney Co., 311 U. S. 435, sustained the law only as imposing a supplementary income tax on the corporation,—not as a privilege tax on the stockholder. The law now having been authoritatively construed by the Wisconsin Supreme Court as a privilege tax on the stockholder, the Wisconsin court was in error in assuming that the decision of this Court in the Penney Case determined the issues of constitutionality.

As indicated in an earlier portion of this brief, at the time that this law was before this Court in *Wisconsin vs. J. C. Penney Co., supra*, the Wisconsin Court had not had occasion to decide upon whom the privilege dividend tax was imposed, having merely held there could be no constructive situs in the State of Wisconsin for an excise tax on the transaction of declaring and receiving dividends. In short, the Wisconsin Supreme Court at that time had not finally construed the Wisconsin privilege dividend tax and determined the incidence of the tax levied thereunder. It had merely characterized the tax as a privilege tax. This Court held that it was not bound by the characterization of the statute so far as that characterization might bear upon the question of its constitutional validity. Since the State Court had not finally determined whether the tax was upon the corporation or the stockholder, this Court had some liberty to construe the statute until the determination of the matter by the State Court.

Erie R. R. Co. vs. Tompkins, 304 U. S. 64, does not relieve Federal Courts of the responsibility of construing State laws in all cases within their jurisdiction when there has not been a construction by the State Court. This principle was recognized in the recent case of *Meredith vs. Winter Haven*, 320 U. S. 228, in which the Circuit Court had dismissed an appeal in a diversity case because State law concerning the

ability of a Florida municipality on its refunding bonds as not clear. At page 237 this Court recognized the aforementioned responsibility in the following language:

> "Accepting this responsibility, as was its duty, this Court has not hesitated to decide questions of state law when necessary for the disposition of a case brought to it for decision, although the highest court of the state had not answered them, the answers were difficult, and the character of the answers which the highest state courts might ultimately give remained uncertain. (citations omitted)"

It is to be noted that the Wisconsin statute lays a tax n "the privilege of declaring and receiving dividends", nd this concept involves not only two separate and disnct acts, but also the acts of different parties. Conronted with a somewhat ambiguous statute which had not een construed by the State Court, at least as to the incience of the tax, it was the duty of this Court to construe he statute if possible so that the law might be held contitutional. The Supreme Court does not presume that a tate Court will so construe its statute as to render it unonstitutional. As this Court said in *Utah Power & Light o. vs. Pfost*, 286 U. S. 165, at 186:

> "Primarily, the construction of these provisions of the statute is for the State Supreme Court, and we cannot assume in advance that such a construction will be adopted, or such an application made of these provisions, as to render them obnoxious to the federal constitution."

See also:

Mountain Timber Company vs. Washington, 243 U. S. 219, 246;
Allen Bradley Local vs. Board, 315 U. S. 740, 746;
Plymouth Coal Company vs. Pennsylvania, 232 U. S. 531, 546;
Bachtel vs. Wilson, 204 U. S. 36, 40.

In accordance with these well established principles, Mr. Justice Frankfurter stated in the *Penney* case at page 443 of 311 U. S. that "* * * the descriptive pigeonhole into which a state court puts a tax is of no moment in determining the constitutional significance of the exaction". In its effort to uphold the Wisconsin statute this Court construed the privilege dividend tax as a "supplementary corporate income tax", and as such held it to be constitutional.*

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* The Court's information as to the Wisconsin income tax system was apparently primarily derived from the case of **Welch vs. Henry**, 305 U. S. 134, which upheld a Wisconsin tax imposed in 1935 on certain 1933 dividend which had been exempt when received. The Court stated that the tax gained "nourishing significance" from the exemption of these dividends but it did not note that the Wisconsin statute permitted the deduction from gross income only of dividends from corporations whose principal business was attributable to Wisconsin, which was defined as meaning corporations which derived 50% or more of their entire net income or loss from Wisconsin (Section 71.04 (4), Revised Statutes of Wisconsin, 1933). Since only a small portion of J. C. Penney's income was attributable to Wisconsin, the opinion of this Court in this particular case was based upon an apparent misconception of the Wisconsin Income Tax Law. It is obvious that the privilege dividend tax was designed partially in order to retain a favorite treatment of the stockholders of domestic corporations (which received more than 50% of their income from within the state), and yet at the same time to obtain a single small income tax on dividends accruing to such stockholders. The income accruing to stockholders of most foreign corporations residing in Wisconsin bears three income taxes (corporate income, privilege dividend, and personal income), while that of most domestic corporations bears only two taxes (corporate income and privilege dividend). The privilege dividend tax law has the effect of imposing a double personal income tax upon resident stockholders of foreign corporations, yet, because of the deduction of one of the taxes at the source, the stockholder does not realize quite as clearly as it otherwise might that he is

(Footnote continued on page 31)

It is submitted that neither the majority opinion by Mr. Justice Frankfurter nor the dissenting opinion by Mr. Justice Roberts regarded the decision of the Wisconsin Supreme Court as a construction of the Privilege Dividend Tax Act, at least as far as the incidence of the tax was concerned. Mr. Justice Roberts agreed that this Court "* * * disregards mere names and descriptive epithets" (311 U. S. at page 447), but held that only by ignoring the express terms of the statute could the tax be regarded as a supplementary corporate income tax. He reasoned that if it could be considered an income tax in any sense, it was upon stockholders, and obviously bad.

As heretofore indicated the Wisconsin Supreme Court on remand in the *Penney* case and in a series of subsequent cases refused to accede to the construction given the law by this Court, and construed the law as a privilege tax on the stockholder.

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paying two taxes. If the States in which non-resident stockholders reside impose an income tax, this income likewise bears three taxes. From the foregoing it is plain that when the question of obtaining further revenue came before the Wisconsin Legislature, and exempt dividends of domestic corporations were suggested as a likely source of additional revenue, a scheme was devised which satisfied the State because it secured the revenue required and likewise satisfied the holders of large blocks of stock in local enterprises because they avoided the payment of the progressive income tax and the surtax which otherwise would almost certainly have been required. In other words a compromise was entered into between politically potent Wisconsin interests at the expense of the stockholders of corporations such as the appellant, which conducts less than half of its business within the state. The privilege dividend tax was designed not to correct the unfairness in regard to surtaxes mentioned by this Court, but to expressly perpetuate it. We submit that this explanation should go far to destroy any particular significance which this Court may have discovered in considering the privilege dividend tax in connection with the Wisconsin income tax system.

The only ground upon which the privilege dividend tax act was ever sutsained in this Court has thus been removed by the Wisconsin Supreme Court. This Court is now presented with a construction by the Wisconsin Court that the incidence of the privilege dividend tax is upon stockholders, and as Mr. Justice Frankfurter stated in the *J. C. Penney* case, *supra*, at page 441.

> " * * * For constitutional purposes, the decisive issue turns on the operating incidence of a challenged tax * * * "

As indicated in an earlier section of this brief, the construction of the privilege dividend tax act by the Wisconsin Court is binding on this Court, and may not be rejected even though this Court does not agree with its reasoning. The construction now given the law by the Wisconsin Court as distinct from its earlier characterization of the law, is diametrically opposed to the construction given the law by this Court in the *Penney* case. Other courts, which have considered this Court's opinion in the *J. C. Penney* case, have considered that the tax was upheld *only* as a supplementary corporate income tax. (See *Wisconsin Gas and Electric Co. vs. Commissioner of Internal Revenue*, 46 F. Supp. 929 at 930. (Revd. 138 F. (2d) 597, and now before this Court on certiorari for decision); *Montreal Mining Company vs. Commissioner*, Docket No. 106876, 2 T. Ct., No. 85 (September 16, 1943)).

In *Fidelity Trust Co. vs. Field*, 311 U. S. 169, the Circuit Court of Appeals had held that it was not bound to follow the ruling of intermediate State Courts on the effect of certain New Jersey statutes. At page 178 this Court stated:

> "Here, the question was as to the construction and effect of a state statute. The federal court was not at liberty to undertake the determination of that question on its own reasoning independent of the con-

struction and effect which the State itself accorded to its statute."

This Court takes cognizance of any change in an interpretation of local statutes which occurs during the course of a litigation. (*Vandenbark vs. Owens-Illinois Glass Co.*, 311 U. S. 538, 542; cf. *Blair vs. United States*, 300 U. S. 55.) Since the Wisconsin Supreme Court has now finally determined the incidence of the tax under the Privilege Dividend Tax Law, the original decision of this Court must be reconsidered in the light of that determination. This is the principle established by the old case of *Green vs. Neal's Lessee*, 6 Peters, 291, in which the Court said at page 299:

> "If the construction of the highest judicial tribunal of a state form a part of its statute law, as much as an enactment by the legislature, how can this court make a distinction between them? There could be no hesitation in so modifying our decisions as to conform to any legislative alteration in a statute; and why should not the same rule apply where the judicial branch of the state government, in the exercise of its acknowledged functions, should, by construction, give a different effect to a statute from what had first been given to it."

See also *Fairfield County vs. County of Gallatin*, 100 U. S. 47, in which this Court reversed a prior opinion on a similar issue upon having a controlling State decision called to its attention.

The construction adopted by this Court in the *Penney* case had no effect whatever on the final meaning to be assigned by the State Court to the local statute (*Meredith vs. Winter Haven, supra*, at 237; *Union Pacific R. R. Co. vs. Weld County*, 247 U. S. 282, 287). The Wisconsin Supreme Court was not constrained from adopting another construction of the Act, and now that such interpretation has been adopted, this Court must inquire into the constitutionality of the act as now construed by the State Court.

Although the Wisconsin Supreme Court did not concur in the view of this Court as to jurisdiction, and indeed apparently did not consider that the tax had been upheld merely as a supplementary corporate income tax, it concluded on remand in the *Penney* case that even under the construction of the law as a tax on the stockholder,— "* * * we are bound by its decision * * *". (*J. C. Penney Co. vs. Tax Commission,* 238 Wis. 69, 74.). The assumption made by the Supreme Court of the State of Wisconsin that even though the construction placed upon the law by that Court was different than the construction placed upon the law by this Court, that the decision in this Court nevertheless controlled on the constitutional question of jurisdiction was further emphasized in the opinion of Mr. Justice Wickhem in the *Wisconsin Gas and Electric Co. vs. Department of Taxation,* 243 Wis. 216 at 220 where it is said:

> "At this stage of the litigation we are not concerned with the question of the power to tax and we must assume that the power vindicated is the power to levy the tax that was before the United States supreme court for consideration."

The error of the Wisconsin Supreme Court which gives rise to this appeal on the constitutional question of jurisdiction, was in not realizing that since it was unable to adopt the construction upon which this Court held the law to be valid, it must proceed to an independent consideration of constitutionality on the basis of such construction of the Act as finally adopted.

Point II: As a privilege tax against the stockholder the law is clearly unconstitutional under the Fourteenth Amendment of the Constitution of the United States as taking the property of appellant and its stockholders without due process of law.

As indicated in the statement of the case, appellant is a Delaware corporation, with its principal office in St. Paul, Minnesota. Directors meetings are held at St. Paul and the dividends involved in this litigation have been declared there. Only a small percentage of its stockholders reside within Wisconsin. If this Court is to sustain the law as now interpreted against the stockholders of a foreign corporation, it must now hold that Wisconsin has the power to exact a tax from *nonresident stockholders of a foreign corporation* merely because some part of the dividend was earned *by the corporation* in Wisconsin. If Wisconsin may not constitutionally directly impose its income tax upon income payable to nonresident stockholders of a foreign corporation, it would appear to be *a fortiori* clearly unconstitutional for it to impose a tax upon such stockholders at the time of a payment of a dividend to the stockholders which corporation is required to deduct.

The privilege of *earning* income in the State of Wisconsin by the corporation *is entirely separate and distinct from the privilege of receiving a dividend out of income* in the surplus account. The privilege of earning the income of the corporation in Wisconsin is a privilege granted to the corporation by Wisconsin that can be taxed and has been taxed against the corporation under the general income tax laws. The privilege of paying and receiving the dividend earned in Wisconsin in prior years to stockholders of a foreign corporation is a privilege neither conferred nor controlled by Wisconsin and may not be taxed by it.

During the entire course of this litigation there has been no suggestion that the Privilege Dividend Act, as a tax on nonresident stockholders, would be constitutional. The difference between the majority and minority opinions of this Court in the *J. C. Penney* case was not as to whether the tax would be constitutional as one on nonresident stockholders, but rather whether, without judicial legislation, the tax could be upheld by considering it as a supplementary corporate income tax. The majority of this Court held merely that the tax in question was valid as a supplementary corporate income tax, both because in its measure and its assumed incidence it had relation to transactions within Wisconsin. This Court did not alter the rule that the measure and incidence of the tax must be related to transactions within the taxing state. A supplementary income tax measured by Wisconsin income, and having its incidence upon the corporation to which the State had granted the privilege of doing business within its borders, would probably fit into the permissible scope of state taxing power. This is not true of a tax upon the right of a nonresident stockholder to receive dividends, since such right is enjoyed under the laws of a sister state and is not exercised within the limits of Wisconsin. Since the majority of appellant's stockholders are nonresidents, the tax as now construed is placed on a foreign subject matter (dividends received by stockholders) and depends upon a foreign contingency (declaration of dividends outside of Wisconsin).

In the *J. C. Penney* case this Court distinguished its prior decision in *Connecticut General Life Insurance Company vs. Johnson*, 303 U. S. 77, by stating that as a supplementary income tax, "the incidence of the tax, as well as its measure, is tied to the earnings which the State of Wisconsin has made possible * * *" The Connecticut General Life Insurance Company case involved an attempt by Cali-

fornia to tax re-insurance contracts made in Connecticut by a Connecticut corporation on policies issued to California residents. At page 80 this Court said:

> "But the limits of the state's legislative jurisdiction to tax, prescribed by the Fourteenth Amendment, are to be ascertained by reference to the incidence of the tax upon its objects rather than the ultimate thrust of the economic benefits and burdens of transactions within the state. As a matter of convenience and certainty, and to secure a practically just operation of the constitutional prohibition, we look to the state power to control the objects of the tax as marking the boundaries of the power to lay it. Hence it is that a state which controls the property and activities within its boundaries of a foreign corporation admitted to do business there may tax them. But the due process clause denies to the state power to tax or regulate the corporation's property and activities elsewhere. (Citing) It follows that such a tax, otherwise unconstitutional, is not converted into a valid exaction merely because the corporation enjoys outside the state economic benefits from transactions within it, which the state might but does not tax, or because the state might tax the transactions which the corporation carries on outside the state if it were induced to carry them on within."

As this Court stated:

> " * * * we look to the state power to control the objects of the tax as marking the boundaries of the power to lay it."

Wisconsin does not acquire jurisdiction to tax dividends of nonresident stockholders " * * * merely because the corporation enjoys outside the state economic benefits from transactions within it * * * ". Wisconsin confers no privilege in connection with the receipt of such dividends by the stockholder.

In *Provident Savings Life Assurance Society vs. Kentucky*, 239 U. S. 103, the United States Supreme Court considered a Kentucky privilege tax on a life insurance company formerly doing business in Kentucky but which had withdrawn from the state. The premiums were paid to the company's New York office. The Court held that Kentucky could not lay a privilege tax on the business. At page 111 this Court stated:

> "Taxation without jurisdiction has been held to be a violation of the Fourteenth Amendment (*Louisville & J. F. Co. vs. Kentucky*, 188 U. S. 385; *Delaware L. & W. R. Co. vs. Penn.*, 198 U. S. 341; *Union Ref. Transit Co. vs. Kentucky*, 199 U. S. 194); and the principle involved applied to the assertion of authority on the part of the state to exact a license tax for the privilege of doing acts which lie beyond the sphere of local control."

See also:

St. Louis Compress Co. vs. Arkansas, 260 U. S. 346, 348, 349;

Louisville etc. Ferry Co. vs. Kentucky, 188 U. S. 385, 396;

Union Refrigerator Transit Co. vs. Kentucky, 199 U. S. 194, 202;

State Tax on Foreign Held Bonds, 15 Wall. 300, 319.

Jurisdiction of the state to levy an income tax upon the income of nonresidents derived from sources within the state is well settled, but the state does not derive its right to levy the tax from the fact that the payor of income is within the state. Jurisdiction over nonresident stockholders does not exist here, and jurisdiction over the subject matter of the transfer would exist if at all only by disregarding the corporate entity.

If it is contended that the jurisdictional justification of
tax is because Wisconsin gave protection to the earn-
of the income found in the dividend, it is of course self-
dent that the protection was given to the *corporation,*
to the stockholder. If it is said that the tax can be
tified against the *stockholder,* as a legitimate "charge"
the doing of *corporate* business within Wisconsin by
corporation, it can only be done by an utter, complete
d unwarranted disregard of the corporate entity. The
eged protection and benefits which Wisconsin gave were
course granted to the *corporation,—but the tax is on the*
ckholder. And the obvious should here be observed,—
t *the general income tax under the laws of Wisconsin*
s been imposed upon the corporation based upon the con-
tion of the appellant as a separate entity, the corporate
come of the appellant having properly been subjected to
income tax laws of Wisconsin. By the privilege divi-
nd tax law as now construed, this same income is sought
be taxed against a foreign stockholder on the receipt of
same in the form of dividends. We reiterate that as a
upon the stockholder, the law can be sustained only by
complete and utter disregard of the corporate entity.

The Wisconsin Supreme Court in its assumption that
is Court had sustained the constitutionality of the law,
gardless of its proper construction,—recognized that to
me extent the corporate entity has been disregarded.
Visconsin Gas and Electric Co. vs. Department of Taxa-
n, 243 Wis. 216, 220.)

There is no justifiable basis whatsoever for the disre-
rd of the corporate entity in the instant case. The se-
rity of business transaction, the regard of the common
w for the corporate entity where its existence is used
gitimately, is entitled to protection and should be pro-
cted.

This Court only recently in an opinion by Mr. Justice Reed in *Moline Properties, Inc. vs. Commissioner of Internal Revenue,* 319 U. S. 436, 438, had occasion to consider the conception of corporate entity and its relation to other phases of the law and particularly to tax law. It was specifically recognized and assumed, as well it necessarily should have been, that the corporate entity where legitimately used, has recognized usefulness in business life and should not be disregarded.

It is of course fundamental, as summarily reflected in Vol. 1, *Fletcher's Encyclopedia of Law of Private Corporations,* Permanent Edition, Sections 24-48, that the corporate entity will normally be respected. Section 40 supports the proposition:

> " • • • Corporate property and stockholder's property and themselves are distinct for purposes of taxation".

It is further of course fundamental, that the corporate entity may be disregarded where necessary to defeat fraud, avoid contravention of law or promote justice. But this rule is only applied under special circumstances.

> (cf. *Anderson vs. Abbott et al,* United States Supreme Court, October Term, 1943, No. 3, decided March 6, 1944, 12—U. S. Law Week, 4211 at 4213.)

The following are the more recent pronouncements by this Court in support of the rule that the corporate entity may be disregarded *only under special and peculiar circumstances:*

> *Burnett vs. Commonwealth Improvement Co.* (1932) 287 U. S. 415, 77 L. Ed. 399;
>
> *New Colonial Ice Company vs. Helvering,* (1934) 292 U. S. 435, 78 L. Ed. 1348;

See also *Page et al vs. Haverty,* (1942) 129 Fed. 2d 512;

And for an extended citation of earlier authority, see *Majestic Co. vs. Orpheum Circuit, Inc.,* (1927) 21 Fed. 2d 720.

In the *New Colonial Ice Co.* case the Court says:

"As a general rule a corporation and its stockholders are deemed separate entities and this is true in respect of tax problems. Of course, the rule is subject to the qualifications that the separate identity may be disregarded in exceptional situations where it otherwise would present an obstacle to the due protection or enforcement of public or private rights."

[The Wisconsin Court has steadfastly recognized the corporate entity in tax matters. (cf. Estate of Shephard, 184 Wis. 88, 94).]

No principles of justice require the disregard of the corporate entity in order to sustain the dividend tax. Wisconsin has the power to tax and is now taxing the income of the corporation earned in Wisconsin and the property of the corporation located in Wisconsin. It has the power to increase these taxes. To deny it the right to tax foreign stockholders will in no way deprive it of a power to raise revenue, but will only limit the exercise of that power to proper objects of taxation. On the other hand, there are numerous principles of justice which operate to compel the respect for the corporate entity.

Under the federal system, the taxing power is exercised continuously by over fifty separate jurisdictions, and their various subdivisions. This Court has repeatedly stated in recent years that problems of taxation are "eminently practical" in nature and should be dealt with in that spirit by the Courts. There are many "practical" reasons why the corporate entity should not be disregarded. The tax obvi-

ously disturbs the contractual relationship between the corporation and any class of stockholders which by contract may be entitled to preferential treatment. The necessity of computing and reporting the tax, deducting the tax from every dividend paid to every stockholder, and advising the stockholder with respect to each deduction creates excessive and unreasonable burdens upon the corporation. If this tax is sustained, this Court thereby encourages competition among the states in seeking revenue from sources beyond their respective borders. The indirect means adopted by the state to retax income which has already been subjected to the Wisconsin tax is an inappropriate exercise of the state's power particularly in view of its right to tax the income of the corporation directly, or to increase that tax by merely increasing corporate rates.

Unless the corporate entity is entirely disregarded, the attempt of Wisconsin to tax a stockholder of a foreign corporation not resident in Wisconsin, is an attempt to "charge" such stockholder for something it has not given him. This is beyond the taxing jurisdiction of Wisconsin. As Mr. Justice Frankfurter stated in the concurring opinion rendered in *State Tax Commission vs. Aldrich*, 316 U. S. 174, at 182:

> "Of course, the Due Process Clause has its application to the taxing powers of the States—a State cannot tax a stranger for something it has not given him. When a state gives nothing in return for exacting a tax, it may be said that there is no 'jurisdiction to tax' ".

The stockholder is a "stranger" to the privilege that Wisconsin gave the corporation in earning the income.

The Wisconsin Supreme Court has now adopted the same construction of the privilege dividend tax as was originally advanced in the dissenting opinion of this Court. The

appellant, therefore, respectfully submits that the rationale of the dissenting opinion be accepted as controlling this case. As Mr. Justice Roberts stated at page 448 of 311 U. S.:

> "By the very terms of the Act, the tax is laid not on the corporation but on the stockholder receiving the dividend, and, by confession, thousands of such stockholders are not residents of Wisconsin. The corporation is the mere collector of the tax and the penalty for failure to collect it is that the corporation must pay it. If the exaction is an income tax in any sense it is such upon the stockholder and is obviously bad."

And as stated at 449:

> "If Wisconsin found that dividend income of stockholders of domestic corporations escaped taxation and should bear it, an effective way to reach the dividend receipts of the stockholder of such corporations was to place a tax upon the receipts of dividend by them. But such a levy upon the stockholders of a foreign corporation, not resident in Wisconsin, obviously was impossible, although that is exactly what was attempted by the statute in question."

Viewed as a privilege tax on the stockholder, there clearly is not a sufficient "nexus" between the earning of the income by the corporation in Wisconsin,—and the subsequent receipt of a dividend from a foreign corporation by a foreign stockholder on which to predicate jurisdiction to tax.

Point III: **The tax as computed by the State is unconstitutionally retroactive.**

Even admitting for the purpose of argument that jurisdiction exists to impose *some* tax, it is self-apparent that the method adopted by the Department of Taxation resulted in subjecting alleged Wisconsin income in surplus to a tax by a law passed years after that income was earned

and transferred to surplus. The assessment as made by the Department is clearly vulnerably retroactive.

As previously stated, the Department in making the computation involved herein analyzed the surplus account of Minnesota Mining & Manufacturing Co. from the date it began business in Wisconsin to December 31st of the year preceding the year in which a dividend was declared in an effort to ascertain what portion of this surplus might be attributable to income derived from Wisconsin business. Proceeding in this manner, the Department year by year determined the ratable contributions of earnings within and without Wisconsin to surplus from the commencement of business in the state, up to December 31st prior to the date of the declaration of the dividend. The Department then took the Wisconsin income in said surplus as the numerator and the total surplus as the denominator of a fraction deemed to be representative of the portion of Wisconsin income in surplus. This fraction was reduced to a percentage and applied to dividends as periodically declared in the following year. The result was claimed to be the amount of Wisconsin income that was distributed by such dividends.

While there is no express statutory authorization for this formula, and there appeared to be no clear indication of what formula the Legislature would have adopted if it chose to act, the Supreme Court of Wisconsin nevertheless construed the law to reflect the intention of the Legislature to tax such accumulations of Wisconsin income in the surplus of foreign corporations *regardless of when earned.*

(*International Harvester Company vs. Department of Taxation,* 243 Wis. 198, 206.)

The only jurisdictional basis ever urged to support the law and tax, so far as it involved dividends of a foreign corporation, was that Wisconsin gave protection to the

earning of the income. *If the jurisdictional question is "whether the state has given anything for which it can ask a return" (Wisconsin vs. J. C. Penney Co., supra,* page 444),—*and if this Court wholly disregards the corporate entity and determines that the stockholders also can be "charged" for the protection given to the corporation in the earning of the income used in the payment of a dividend,—the indisputable salient fact remains that this protection was given only in the year in which the income was earned,—not at such later time as such income might be used in the transaction of a dividend.* The formula used by the Wisconsin Department of Taxation imposes a tax for a privilege admittedly granted years before the enactment of the law so taxing it. The decisions are conclusive to the effect that while retroactive income taxes are permissible, they cannot be imposed without limit and are upheld only as to recent transactions.

Welch vs. Henry, 305 U. S. 134, affirming 236 Wis. 595;

People ex rel vs. Beck et al vs. Graves, 280 N. Y. 405, 21 N. E. (2d) 371 at 372 where the case of *Welch vs. Henry,* 305 U. S. 134, is discussed.

See also with respect to constitutional problem of retroactive excise taxes:

Nichols vs. Coolidge, 274 U. S. 531, 542, 543;
Blodgett vs. Holden, 275 U. S. 142, 147;
Untermeyer vs. Anderson, 276 U. S. 440, 445;
Coolidge vs. Long, 282 U. S. 582, 595, 596;
cf. *Cooper vs. U. S.,* 280 U. S. 409.

For one of the most recent discussions of the constitutionality of retroactive excise taxes, see:

Matter of Lacadin Realty Corp. vs. Graves, 288 N. Y. 354.

There is also a definite indication in the cases treating the constitutionality of retroactive taxes that the matter of "anticipation" of the possibility of the enactment of the particular tax law may be important. We submit that the enactment of the privilege dividend tax law by Wisconsin in 1935 could not have been reasonably anticipated by any potential taxpayer prior to the time that the legislation was initiated. There was clearly no adequate "forewarning" that such a tax would be enacted, or precedent for the Wisconsin privilege dividend tax under the tax pattern adopted by the State of Wisconsin. Indeed so far as we are aware, neither was there any precedent for the type of law in question under the laws of any other state. Accordingly, there is no basis to contend in an argument to save the law from unconstitutional retroactivity that the taxpayer might reasonably have anticipated the enactment of the law and the imposition of the tax in question.

It is further perfectly obvious that the stockholders of a particular corporation may be quite different, or indeed entirely different, at the time that a dividend is paid, from those existing years before at the time the income of the corporation, which may be used in the dividend, was earned. We thus have the anomalous situation, if the tax is sustained, of a taxpayer (the stockholder) paying for the privilege given to the corporation in earning the income years before the stockholder acquired stock in the corporation.

Another observation should here be made of the retroactivity features of the law. It has been argued by the opposition that the tax is merely measured by accrued income that has not been previously distributed and still remains income,—and that the tax attaches when there is a distribution thereof as income. But the argument requires the conclusion that "once income always income",—and if

carried to its logical conclusion would require the designation of most property as income because it was originally derived from income. There of course must be some time limit when accumulated income in surplus loses its identity as income for tax purposes.

cf. *Appeal of Siesel*, 217 Wis. 661, 665;
Fitch vs. Tax Commission, 201 Wis. 383, 391;
State ex rel Sally F. Moon Co. vs. Tax Commission, 166 Wis. 287, 293;
See also article by Arthur Leon Harding, "State Jurisdiction to Tax Dividends and Stock Profits to Natural Persons", 25 *California Law Review*, 139, 158.

The suggestion has been made that the tax is not retroactive if it is viewed as a transaction tax in view of the fact that the transaction takes place after the enactment of the law. We submit however that the formula as applied is equally vulnerable because in fact income is being taxed under the guise of a tax upon the privilege of distributing it. If the only jurisdictional justification of the tax is that it relates to income earned by the corporation in Wisconsin, and if income earned more than a year or two before the enactment of a tax law is exempt from tax, such exemption should not be circumvented by imposing the tax *nominally* upon the transaction instead of on the income, which is the subject matter of the transaction. Validity cannot be given to an invalid retroactive tax upon accumulated Wisconsin income by making it contingent upon a contemporary foreign event. As this Court said in the *J. C. Penney* case, the description of the tax is of no moment in determining the constitutional significance of the exaction and the tax as computed is not rendered less retroactive by giving it a different label.

The Wisconsin Court was evenly divided on the constitutionality of this alleged retroactive application of the tax. By reason of the fact that the lower court had ruled in favor of constitutionality, the taxpayer's contention that the law was unconstitutional was denied. Our views concerning the unconstitutional retroactivity of the tax are well expressed by Mr. Justice Wickhem in the *International Harvester Company* case, 243 Wis. 198, where he stated at page 208:

> "Mr. Chief Justice *Rosenberry*, Mr. Justice *Martin*, and the writer are of the view, (1) that since the United States supreme court has held that the label placed upon this law by the legislature or by this court is wholly ineffective to impair its constitutionality as against the contention that Wisconsin is without power to levy the tax, such label or designation or the selection by Wisconsin of the payment and receipt of the dividend as the occasion for the tax is equally ineffective to save it from objections to its retroactivity; (2) that the earnings of the corporation in Wisconsin upon which are grounded Wisconsin's power to levy the dividend tax must be within reach of a retroactive tax; (3) that the extent of permissible retroactivity should be determined upon the analogy of the income tax cases; (4) that retroactivity should only be permitted to 'recent' transactions; (5) that consistently with these principles the tax may not be applied to earnings in Wisconsin which accrued prior to the last corporate fiscal year preceding the enactment of Wisconsin privilege dividend tax; (6) that by reason of the severability clause, the operation of the tax should be so limited; (7) that nothing in the decision upon remand requires a different conclusion."

We thus submit that even if this Court should determine, by disregarding the corporate entity, that Wisconsin had jurisdiction to impose *some* tax, that to permit of the imposition of a tax on Wisconsin earnings in surplus, earned

years before the enactment of the law, is so harsh, arbitrary and oppressive as to transgress constitutional limits.

Conclusion.

It is respectfully submitted that the law as a privilege tax upon stockholders of foreign corporations is clearly unconstitutional under the Fourteenth Amendment of the United States, and that the judgment of the Supreme Court of the State of Wisconsin to the contrary should be reversed.

It is further respectfully submitted in the alternative that in any event so much of the law as attempts to tax alleged Wisconsin income in surplus, *regardless of when earned*, is unconstitutional under the Fourteenth Amendment of the United States of America.

Respectfully submitted,

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Appendix.

The statutes and laws of the State of Wisconsin which are involved, are as follows: Section 3, Chapter 505, Laws of Wisconsin, 1935, effective on its publication on September 26, 1935, and as amended by Chapter 552, Laws of Wisconsin, 1935, effective on its publication on October 8, 1935, provide:

"Section 3. *Privilege Dividend Tax.* (1) For the privilege of declaring and receiving dividends, out of income derived from property located and business transacted in this state, there is hereby imposed a tax equal to two and one-half per centum of the amount of such dividends declared and paid by all corporations (foreign and local) after the passage and publication of this act and prior to July 1, 1937. Such tax shall be deducted and withheld from such dividends payable to residents and nonresidents by the payor corporation.

(2) Every corporation required to deduct and withhold any tax under this section shall, on or before the last day of the month following the payment of the dividend, make return thereof and pay the tax to the tax commission, reporting such tax on the forms to be prescribed by the tax commission.

(3) Every such corporation hereby made liable for such tax, shall deduct the amount of such tax from the dividends so declared.

(4) In the case of corporations doing business within and without the state of Wisconsin, such tax shall apply only to dividends declared and paid out of income derived from business transacted and property located within the state of Wisconsin. The amount of income attributable to this state shall be computed in accordance with the provisions of chapter 71. In the absence of proof to the contrary such dividends shall be presumed to have been paid out of earnings of such corporation attributable to Wisconsin under the provisions of chapter 71, for the year

immediately preceding the payment of such dividend. If a corporation had a loss for the year prior to the payment of the dividend, the tax commission shall upon application, determine the portion of such dividend paid out of corporate surplus and undivided profits derived from business transacted and property located within the state.

(5) Dividends paid by a subsidiary corporation to its parent shall not be subject to the tax herein imposed provided that the subsidiary and its parent report their income for taxation under the provisions of chapter 71 on a consolidated income return basis, or both corporations report separately.

(6) The provisions of this section shall not apply to dividends declared and paid by a Wisconsin corporation out of its income which it has reported for taxation under the provisions of chapter 71, to the extent that the business of such corporation consists in the receipt of dividends from which a privilege dividend tax has been deducted, and withheld and the distribution thereof to its stockholders.

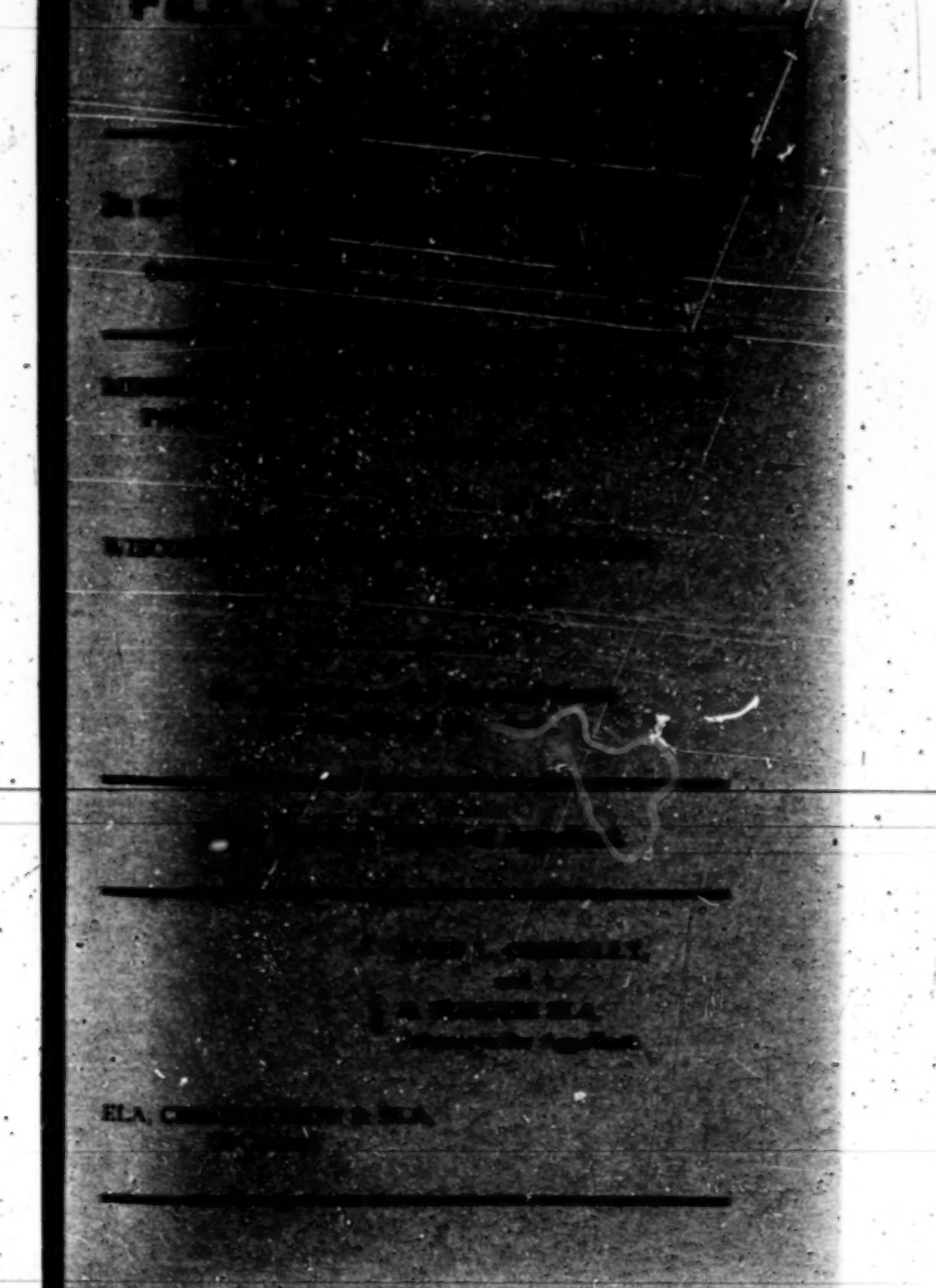
(7) For the purposes of this section dividends shall be defined as in section 71.02, except that the tax herein imposed shall not apply to stock dividends or liquidating dividends.

(8) The tax hereby levied, if not paid within the time herein provided, shall become delinquent and when delinquent shall be subject to a penalty of two per cent on the amount of the tax and interest at the rate of one-half per cent per month until paid.

(9) The tax hereby imposed shall, when collected by the tax commission, be paid by it into the state treasury."

The above legislation was extended in operation by Chapter 309 of the Session Laws of Wisconsin of 1937 to July 1st, 1939, and by Chapter 198 of the Session Laws of 1939 to July 1st, 1941, further by Chapter 198 of the Session Laws of 1939, the rate was increased from two and

one-half per cent (2 1/2%) to three per cent (3%). Chapter 223, Session Laws of 1937, also slightly amended the law, but such amendment has no bearing on the controversy here involved.



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Secondary Authorities Cited:

In the Supreme Court of the United States

October Term, 1943 - - - - - - - Number 621

MINNESOTA MINING & MANUFACTURING COMPANY,

Appellant,

vs.

WISCONSIN DEPARTMENT OF TAXATION,

Appellee.

Reply Brief of Minnesota Mining and Manufacturing Company, Appellant.

I.

Notwithstanding appellee's argument, it is clear that the whole foundation and basis on which constitutional justification for the law and tax was predicated by this Court in *State of Wisconsin vs. J. C. Penney Co.*, 311 U. S. 435, has now been removed. No valid ground is suggested by appellee to support its jurisdiction to levy the tax involved on this appeal.

In our original brief we pointed out that the whole foundation and basis upon which constitutional justifica-

tion for the Wisconsin privilege dividend tax law and tax was predicated by this Court in *State of Wisconsin vs. J. C. Penney Co.*, 311 U. S. 435, has now been removed by reason of subsequent decisions in the Wisconsin Supreme Court authoritatively and finally construing the law as a privilege tax on the stockholder,—whereas this Court in the *Penney* case had sustained the law on the theory that it was a supplementary income tax on the corporation.

Appellee challenges our assumption as to the basis upon which this Court sustained the law and further challenges what seemed to us perfectly unqualifiably clear,—that the Wisconsin Court has unequivocally held the tax to be a privilege tax upon the *stockholder*.

Indeed, after reading appellee's brief, we have difficulty in determining the exact nature of the tax which appellee claims the instant law to levy. Appellee denies that this Court in the *Penney* case held the tax an income tax, although apparently it considers the tax to have been sustained on the theory that it was a tax against the corporation. Appellee further denies that the Wisconsin Court has held the tax to be against the stockholder. From this we must conclude that the appellee's contention is that the tax is a tax against the corporation and that it is a tax other than an income tax.

In our analysis of the matter, we insisted that there was a basic *conflict of construction* between that given the law by this Court in the *J. C. Penney* case and that later given it by the Wisconsin Court when the matter was presented to it. To summarily reflect this conflict of construction we submitted a tabular analysis on the insert following page 18 of our brief. Appellee vigorously criticizes this insert insisting that it is an unfair method of presentation, apparently on the theory that appellee contends we should also have included citation of *International Harvester Co. vs. Dept. of Taxation*, 243 Wis. 198. But there was nothing

in the *International Harvester Company* decision which in any way modified or changed or affected the determination of the Wisconsin Supreme Court that the tax was a privilege tax on the stockholder. The Wisconsin Court did in the *International Harvester Company* case make an attempt to reconcile the *decisions* of this Court in the *Penney* case with the decision of the Wisconsin Supreme Court. It did not however in any way whatsoever temper its *construction of the law* as a privilege tax on the stockholder, and indeed the same justice who wrote the opinion for the Court in the *International Harvester Company* case on the same day rendered the decisions in the *Wisconsin Gas and Electric Company vs. Dept. of Taxation*, 243 Wis. 216 and *Blied vs. Wisconsin Foundry and Machine Co.*, 243 Wis. 221, which unequivocally determined the tax to be a privilege tax upon the stockholder.

Appellee further argues the importance of any decision in this case as it may affect the fiscal affairs of the State, and cites in tabular form the amount of privilege dividend tax collected since the enactment of the law. Such table apparently reflects not only the tax collected in connection with dividends of foreign corporations but domestic corporations as well. There obviously would be some loss of revenue to the State of Wisconsin if the law is held unconstitutional with respect to dividends of foreign corporations. In every tax law which comes before a court for decision upon constitutional issues there is a question of possible loss of revenue involved, but that furnishes no legitimate reason for a court to hesitate to enforce constitutional provisions. The Legislature chose to enact this anomalous tax law and as we pointed out in our original brief, it appears to have been one of the express purposes of the act to cast a burden upon stockholders of foreign corporations, although there were well recognized means of collect-

ing revenue which might have been used and which still may be employed to fully recompense the state for any revenue lost as a result of this litigation. The advantages of a sound taxing system pursuant to which each state taxes that which is within its sphere and refrains from seeking sources of revenue which belong to its neighbors in order that the constituents of its legislators may be relieved of a burden which is rightfully theirs, are far stronger than any temporary inconvenience which may be caused by the striking down of any particular exaction. It is the very essence of the constitutional form of government that a statute which conflicts with constitutional safeguards must give way. (*Marbury vs. Madison*, 1 Cranch 137, 2 Law Ed. 60, 183.) The whole of the argument made by the appellee in this respect was concisely and accurately answered by Chief Justice Rosenberry in the original decision of the Wisconsin Supreme Court in *J. C. Penney Co. vs. Tax Commission*, 233 Wis. 286 at 297 wherein it said:

> "We are strongly urged to affirm the judgment in this case because the state treasury is dependent upon the maintenance of the right of the state to tax dividends of foreign corporations to the extent that such dividends are derived from earnings within the state. The matter of financial exigencies of the state, however, afford no justification for the ignoring of a rule of law laid down by the United States supreme court. *The state must find its revenues within the field within which its taxing power may be exerted as prescribed by the constitution and laws of the United States.*" (Italics ours)

See also *Helvering vs. Hallock*, 309 U. S. 106, 119, and 120.

Neither is there any merit in the appellee's contention that the re-enactment of the law by successive state legislatures in any way affects the issue now before this Court.

It is suggested by the appellee that the re-enactments of the law adopted the construction of the courts as an integral part of the statute the same as if written into it and that the statute should now be given such construction. A perfectly proper query might be made as to which decision affecting this law should be integrated into the statute,—whether the original decision of the Wisconsin Supreme Court in *State ex rel Froedtert G. & M. Co. vs. Tax Commission,* 221 Wis. 225, whether the decision in the original *J. C. Penney* case in the Wisconsin Supreme Court in 233 Wis. 286, whether the decision of this Court in the *Penney* case in 311 U. S. 435, whether the decision in the *Penney* case on remand in the Wisconsin Supreme Court in 238 Wis. 69 or whether one or all of the several decisions decided by the Wisconsin Supreme Court on June 16, 1943 referred to in our original brief. In any event, this argument of the appellant is addressed to the *construction* to be given the law and should properly be made only to the state court, in view of the fact that the law has now been unqualifiedly construed by the state court as imposing a privilege tax upon the stockholder. This Court must accept the statute as now authoritatively construed by the state court.

Nor, is there merit in appellee's contention that this Court in the *Penney* case sustained the law on the same basis as the Wisconsin Court did in the *Froedtert* case. There can be little question but that in the *Froedtert* case, the theory on which the tax was sustained was on the ground that Wisconsin retained a constructive situs of the earnings from Wisconsin traceable to the fund distributed by the dividend, and that because of this constructive situs Wisconsin has jurisdiction of the *res* which was the subject of the transfer, and had the power to tax this transfer irrespective of upon whom the burden of the tax rested. We submit that any fair reading of the decision of this

Court in the *J. C. Penney Company* case shows that the law was not sustained in this Court on any such basis. The distinctions in the theories followed seems clearly apparent when it is considered that under the theory employed by this Court the privilege dividend tax is valid only if it be construed as a corporate tax. This theory however can not serve to sustain the tax if viewed as imposed upon the stockholders. On the other hand under the theory followed in the *Froedtert* case, the Wisconsin Court found it unnecessary to determine whether the tax was upon the corporation or the stockholder. For a law review article commenting upon the opinion of this Court in the *Penney* case which clearly points out the distinction between the theory followed by this Court and that followed by the Wisconsin Court in the *Froedtert* case, see 8 *University of Chicago Law Review*, page 605.

We thus submit that it is very clear that the foundation and basis of this Court's decision in the *Penney* case on which constitutional justification for the law was predicated has been removed by the subsequent Wisconsin decisions, and that an entirely new constitutional question is presented by the record in this case.

II.

There is clearly no merit in appellee's contention that the Supreme Court of Wisconsin did not hold the tax to be imposed upon the stockholder.

In an effort to bolster its jurisdictional argument, and with apparent realization that as a tax on the stockholder the jurisdictional basis of the tax is precarious, appellee argues from page 36 to page 42 of its brief that the Supreme Court of Wisconsin has not held that the tax is imposed upon the stockholder. Says the appellee at pages 36-37:

"In support of their assertion that this tax has been 'construed' by the Supreme Court of Wisconsin as a tax upon the stockholder, the appellant cites *Wisconsin Gas & Electric Co. vs. Dept. of Taxation* (1943), 243 Wis. 216, 10 N. W. 2, 104; *Blied vs. Wisconsin Foundry and Machine Co.* (1943), 243 Wis. 221, 10 N. W. 2, 142. Neither of these cases are to that effect.

In the first place the provisions of this tax law clearly provide that the corporation may deduct the tax from the dividends paid to stockholders. The Court thus did not and was not required to construe the statute, but merely gave effect to and applied the express provisions of it."

The appellee at page 38 of its brief criticizes counsel for the United States Government in Case Number 565, October Term, 1943, presently pending in this Court, entitled *Wisconsin Gas and Electric Co. vs. U. S.* for an assertion in their brief that the question involved in *Wisconsin Gas and Electric Co. vs. Dept. of Taxation, supra,* was whether the tax was on the corporation. In criticizing the assertion made by counsel for appellant in the instant case and for counsel for the Government in Case Number 565, October Term, 1943 of this Court, counsel has apparently overlooked the fact that on the motion for rehearing in the Supreme Court for the State of Wisconsin of the decision from which this very appeal was taken, that the State of Wisconsin by the same counsel which now represents it said at page 5 of respondent's brief opposing motion for rehearing:

"*It is immutably established by the Wisconsin Gas & Electric case (June 16, 1943) that the burden of the privilege dividend tax is upon the stockholder. Lest anyone question that the court actually so held, need we do more than to set out* the following statement in *that case:*

'We are certain of three things: (1) that the burden of the tax is specifically laid upon the stock-

holder; (2) that the corporation declaring the dividend must declare the tax from the dividend and may not under any circumstance treat the tax as a necessary expense of doing business; (3) that the power to levy the tax so construed was authoritatively established in the Penney case. It follows that appellant's contentions must fail.' " (Italics ours)

Can there be any question but that the same counsel who now attempt to argue that the Wisconsin Court has not determined the tax to be a tax upon the stockholder, did not there dogmatically assert that the tax was held by the Wisconsin Court to be on the stockholder? Nor is there any reasonable question but that in the brief on motion for rehearing counsel for the state were correct in making such assertion.

We insist the question is not open to doubt and the Wisconsin Court has made a deliberate determination that the tax is against the stockholder and not against the corporation.

To argue as does appellee at page 37 of its brief that the Wisconsin Supreme Court in the case of *Blied vs. Wisconsin Foundry and Machine Co.*, 243 Wis. 221, did not hold the tax to be upon the stockholder, requires even greater intellectual ingenuity than to so argue about the *Wisconsin Gas and Electric Company* case. The issue in the *Blied* case was simple. The plaintiff, Blied, had preferred stock in a Wisconsin corporation. He was entitled to his full dividend. When the dividend was paid to him the corporation deducted the amount of the privilege dividend tax. He sued for recovery of the amount deducted claiming the tax was on the corporation and not on the stockholder. The Wisconsin Supreme Court, as pointed out in our original brief, denied the stockholder recovery. If ever a square holding could exist, holding the tax to be against the stockholder and not against the corporation, it clearly existed in the *Blied* case. If the litigant stockholder, Blied, was told

that the Court had not decided the tax to be against him, as appellee now asserts, he obviously would rightfully be in a quandry as to what the Court did determine. The fact that the *Blied* case involved a dividend of a domestic corporation rather than a foreign corporation, can make no conceivable difference in testing whether the incidence of the tax is upon the stockholder or the corporation. The same identical law, so far as liability for tax is concerned, is applicable to both.

Nor is there any conceivable merit to appellee's argument at page 20 of its brief that because liability for the tax is imposed upon the corporation, the incidence of the tax is upon the corporation. *There of course is no question but what the corporation is merely a collecting agent,* as was the National Bank in *Colorado National Bank vs. Bedford,* 310 U. S. 41 cited in our original brief, or as was the employer in *Travis vs. Yale Towne and Mfg. Co.,* 252 U. S. 60. The fact that the corporation is a collecting agent no more makes it a taxpayer than is an employer under the withholding phase of the current Federal income tax law. In a substantially similar type of withholding tax this Court in *U. S. vs. Railroad Co.,* 17 Wallace 322 at pages 326 and 327 said:

> "In the cases we are considering the corporation parts not with a farthing of its own property. Whatever sum it pays to the government is the property of another. * * * Whatever it thus pays to the government, it by law withholds from the creditor. * * * There is no pecuniary burden upon the corporation, and no taxation of the corporation. The burden falls upon the creditor. He is the party taxed * * * "

In the instant case exactly the same reasoning applies. After the declaration of a divend the stockholder becomes a creditor. Whatever sum the corporation deducts from the dividend and pays for the privilege dividend tax is the

property of another. There can be no question but what the stockholder and stockholder alone is the party taxed. There is almost no risk attached to the corporation, its liability as withholding agent to pay the tax exists only after the dividend is declared. The assertion by appellee at page 41 of its brief that if a corporation is not doing business in Wisconsin at the time of payment of the dividend, that the state can impose no tax is merely an assertion by counsel. The law makes no provision in connection with a situation of this sort. No decision of any court exists to support the statement. If the assertion is correct, it is so only because no enforcement exists for the collection. But such an argument has no persuasiveness in a determination of upon whom the tax burden rests in the instant case.

We resubmit as in our original brief, that there is no question but what the tax is a tax on the stockholder, and that the Wisconsin Court has unequivocally so determined. Appellee's arguments to the contrary are wholly without merit.

III.

Appellee suggests no valid ground under which the tax involved falls within the taxing jurisdiction of the State of Wisconsin. The only grounds suggested on which to predicate jurisdiction requires a complete and unwarranted disregard of the corporate entity and requires a repudiation of the principles involved by the unanimous decision of this Court in *Rhode Island Trust Co. vs. Doughton*, 270 U. S. 69.

We have searched appellee's brief in vain to find any logical suggestion on which it can be said that under the tax law as now authoritatively construed, jurisdiction exists in favor of Wisconsin to tax the transactions involved on this appeal. Appellee's argument on this phase of the case

is contained in Heading IV of its brief entitled: "The tax is clearly within the taxing jurisdiction of the State of Wisconsin."

The bulk of appellee's argument is predicated on the wholly erroneous *assumption* that the tax is a tax against the corporation and not against the stockholder, and with the elimination of this erroneous assumption, all of the suggested bases urged to sustain jurisdiction vanish, unless the corporate entity is wholly and completely disregarded.

We have no quarrel with several of the hypothetical statements made by appellee as to jurisdiction. The difficulty with such statements is that they do not fit into the tax pattern of the instant tax law except by a complete and unjustified emasculation of the statute, wholly contrary to the statute as now authoritatively construed by the Wisconsin Supreme Court.

While appellee approaches the matter from several different viewpoints in an effort to find grounds on which to predicate jurisdiction, we submit that all of the arguments urged finally revert back to the contention that the power to tax is based on the protection which Wisconsin offered in the acquisition of the earnings and an alleged protection of these earnings until distributed. We submit that the *whole* gist of appellee's contention is reflected in the following assertion from page 48 of its brief:

> "The jurisdiction to impose a tax upon foreign corporations is derived from the power to extract from corporate enterprises an exaction measured by Wisconsin earnings distributed to stockholders in the form of dividends. The power to impose this exaction arises by reason of the protection that the State affords in the acquisition of earnings that are distributed and the protection thereof until so distributed."

It is perfectly obvious that the "protection" which the state affords in the acquisition of the earnings is *protection to the corporation,*—for which the State has properly in the form of a *corporate* income tax exacted a price, and the corporate entity of the taxpayer has properly been scrupulously regarded for this purpose. But what protection has Wisconsin afforded to the *stockholder,* as distinct from the corporation, for which it can ask a return from the stockholder, at the time the stockholder receives the dividend from the foreign corporation? We submit that appellee suggests no such independent protection to the stockholder, and that none such exists. Appellee does definitely suggest that there is no constitutional reason why the corporate entity could not be disregarded and asserts among other things at page 51:

> "Even if this were a tax on the stockholders, there is nothing in the constitution which precludes its state legislature that permits corporations foreign and domestic to do business within the state, in the imposing of taxes on fruits thereof from looking through the corporate entity and imposing the tax upon the real beneficiaries when and as they realize such fruits and who enjoy such benefits in the precise amount by which the tax is measured."

Obviously the appellee in making that suggestion urges a complete disregard of the corporate entity solely in order to sustain the jurisdiction to impose the tax, even though the corporate entity was strictly regarded for the purpose of imposing an income tax at the time of the earnings of the very income involved. Appellee in making the above assertion further has apparently wholly disregarded the *unanimous* decision and holding of this Court in *Rhode Island Trust Co. vs. Doughton,* 270 U. S. 69, which held that the state of North Carolina could not levy an inheritance tax on shares in a New Jersey corporation owned by Rhode Island decedent, the tax being measured by that pro-

portion of the value of the shares that represented corporate assets in North Carolina as compared with total corporate assets. Virtually the same arguments to support the tax against the stockholder's estate were made in that case as in the present case. It was contended by representatives of the state of North Carolina that the beneficial ownership of the property rested in the stockholder,—that approximately two-thirds of the corporate assets were located in North Carolina and accordingly two-thirds of the value of the stock should be subjected to the North Carolina inheritance tax. It was further specifically contended that jurisdiction to tax existed because practically all of the profits that had accrued to the decedent from his ownership of shares accrued in North Carolina. This Court, in a *unanimous* decision by Chief Justice Taft, held that no jurisdiction existed in favor of North Carolina to impose such a tax and stated at page 81:

> "In this case the jurisdiction of North Carolina rests on the claim that, because the New Jersey corporation has two-thirds of its property in North Carolina, the State may treat shares of its stock as having a situs in North Carolina to the extent of the ratio in value of its property in North Carolina to all of its property. This is on the theory that the stockholder is the owner of the property of the corporation, and the state which has jurisdiction of any of the corporate property has *pro tanto* jurisdiction of his shares of stock. We can not concur in this view. The owner of the shares of stock in a company is not the owner of the corporation's property. He has a right to his share in the earnings of the corporation, as they may be declared in dividends, arising from the use of all its property. In the dissolution of the corporation he may take his proportionate share of what is left, after all the debts of the corporation have been paid and the assets are divided in accordance with the law of its creation. But he does not own the corporate property."

The Court further after reviewing the decisions of several courts, continued at page 83:

> " * * * But whatever the view of other courts, that of this court is clear: the stockholder does not own the corporate property. *Jurisdiction for tax purposes over his shares can not, therefore, be made to rest on the situs of part of the corporate property within the taxing State. North Carolina can not control the devolution of New Jersey shares.* That is determined by the laws of Rhode Island where the decedent owner lived or by those of New Jersey, because the shares have a situs in the state of incorporation. There is nothing in the statutory conditions on which the Tobacco Company began or continued business in North Carolina which suggests that its shareholders subjected their stock to the taxing jurisdiction of that State by the company's doing business there." (Italics ours)

Surely, the income of the nonresident stockholder from dividends declared and paid by a foreign corporation outside the state of Wisconsin is no more subject to tax than the certificates of stock themselves, on the ground that the business of the corporation in Wisconsin contributed in some degree to their amount or value. If the State of North Carolina which gave protection to two-thirds of the corporate assets of the corporation involved in the *Doughton* case and further gave protection to the earning of praetically all the income of the corporation, did not have the jurisdictional right to impose a tax upon the devolution of the shares of stock in the corporation upon the death of a foreign stockholder of a foreign corporation, we submit that it follows *a fortiori* that Wisconsin has no jurisdiction to impose upon a foreign stockholder of a foreign corporation a tax for receiving dividends on the ground that Wisconsin gave the *corporation* protection in the earning of the income partially composing the dividend. This is especially true in view of the fact that the corporation has paid a tax for the privilege of earning the very earn-

ings involved, in the form of a general corporate income tax.

It is of course fundamental that once a dividend is declared it becomes a debt of the corporation and a shareholder becomes a creditor of the corporation.

11 *Fletcher Cyc. Corp.* (perm. ed.), Section 5322, page 786;

7 *Thompson on Corporations* (2d ed.), Section 5308, page 1831 *et seq.*;

Zinn vs. Germantown Farmers Mut. Ins. Co., 132 Wis. 86.

Upon collection of this debt such dividend of course becomes income in the hands of the stockholder. It is this income of a foreign stockholder of a foreign corporation upon which attempt is made to impose the privilege dividend tax. It is perfectly obvious that even if the tax could be sustained against the corporation it can not be sustained against the stockholder merely because a tax upon the corporation, having the same measure and rate, might be valid. (*U. S. vs. Railroad Co.*, 17 Wallace 322.)

Appellee's theory in effect leads to a contention that if jurisdiction exists to levy a tax upon the corporation it is equivalent in its effect to a tax upon the stockholder, and that accordingly the tax should be sustained upon the same theory. Appellee wholly disregards the holdings which were cited in our original brief in *Oklahoma vs. Wells Fargo*, 223 U. S. 298 and *Home Savings Bank vs. Des Moines*, 205 U. S. 503. An almost identical contention was made and rejected in the case of *Home Savings Bank vs. Des Moines*, 205 U. S. 503, wherein the Court held at page 519:

> "One other consideration only needs to be noticed. It is said that where a tax is levied upon a corporation measured by the value of the shares in it, it is equivalent in effect to a tax (clearly valid) upon the

shareholders in respect of their shares because, being paid by the bank, the burden falls eventually upon the shareholders in proportion to their holdings. It was upon this view that the lower court rested its opinion. *But the two kinds of taxes are not equivalent in law, because the State has the power to levy one and has not the power to levy the other.* The question here is one of power and not of economics. *If the State has not the power to levy this tax, we will not inquire whether another tax which it might lawfully impose would have the same ultimate incidence.*" (Italics ours)

Appellee cites no applicable authority in support of its argument on jurisdiction other than the purported authority of this Court in the *Penney* case and the Wisconsin Court in *State ex rel Froedtert G. & M. Co. vs. Tax Commission*, 221 Wis. 225.

Cases cited by the appellee such as *Graves vs. Elliott*, 307 U. S. 383, *Curry vs. McCanless*, 307 U. S. 357, *Bullen vs. Wisconsin*, 240 U. S. 625 are not authority to sustain jurisdiction in the instant case. In all of these three cases a decedent domiciled in one state set up a trust of intangibles with a trustee in a second state. In two of the cases the decedent reserved the power of revocation; in the third, a power to dispose of the corpus by will. In these cases this Court held that both the state of the decedent's domicile and the state of the seat of the trust might impose a succession tax. These cases involved taxation by the state of domicile and the state in which a trust is conducted, each of which is a sound basis of jurisdiction. No analogous basis exists in the instant case however. Neither is *Ford Motor Co. vs. Beauchamp*, 308 U. S. 331 cited by the appellee analogous. In that case there was merely involved a franchise tax *against the corporation* based in part upon the proportion of capital employed in the taxing state, calculated by a percentage of sales within the taxing state. This Court properly held that such a tax against the *cor-*

poration so measured is a proper "charge" for the protection given.

Even if it were assumed that the tax was a tax against the corporation and not against the stockholder there would still be no jurisdictional basis on which to predicate the tax. As pointed out in our original brief there must come a time when earnings lose their identity as income and become capital. Especially is this true after such earnings have responded to a corporate income tax of the state where earned. Wisconsin cannot tax wealth or the transfer of wealth after it has lost its identity as Wisconsin income any more than it can tax property before it become identified as Wisconsin property. Appellee apparently argues as the Supreme Court of Wisconsin originally did in the *Froedtert* case that the protection which Wisconsin gave to the acquisition of earnings *to the corporation* gave Wisconsin permanent jurisdiction to tax any transaction in which these earnings were involved, regardless of the place or time of the transaction. In short it is contended in effect that once protection is given to the acquisition of these earnings that they permanently retain a constructive situs for tax purposes within the state where earned.

If the rules suggested by appellee are sound it would mean that an excise tax on withdrawals from the St. Paul bank accounts of the appellant might be imposed by every state from which funds deposited in that bank account were derived; it would mean that all such states might levy sales tax upon the transactions involving such funds. It would seem to require that any state from which earnings composing a part of the corporate surplus were drawn could levy a stock transfer tax. In short if the contention were sustained there would be no practical limitation upon the types of transactions that might be taxed solely because the fund was originally derived from the taxing state.

The following language of this Court in *Connecticut General Life Insurance Co. vs. Johnson*, 303 U. S. 77, at page 81 is applicable to appellee's argument on this phase of the case:

> A tax " * * * is not converted into a valid exaction merely because a corporation enjoys outside the state economic benefits from transactions within it, which the state might but does not tax * * * "

We submit that the appellee has suggested no theory upon which this tax can be jurisdictionally sustained either on the basis of authority of this Court or as an original proposition upon principle. To the contrary we submit that on principle no sound jurisdictional basis exists upon which to impose the tax, and that there is abundant authority which is cited in our original brief which militates against jurisdiction upon the record in this case.

IV.

If the tax could be sustained upon the jurisdictional grounds urged by the appellee, the tax is clearly unconstitutionally retroactive.

In an attempt to save the tax from the criticism that it is retroactive, the appellee shifts grounds as to the "jurisdictional fact" upon which the tax is based. On the jurisdictional argument, as we understood appellee's position, it was contended that the tax can be sustained primarily because Wisconsin had given protection to the earning of the income by the corporation which was ultimately used in the transaction of the dividends.

On the retroactivity phase of the case appellee attaches all important emphasis on the "*transaction*" which transaction admittedly takes place outside the state of Wisconsin and which transaction does not depend on the efficacy of Wisconsin laws on which to support it. The reasons

for appellee's position is obvious, inasmuch as the *transactions* occurred after the passage of the law.

If the tax as to a foreign corporation is justified because Wisconsin has given some protection to the earning of the income, to pass a law "charging", so to speak, for this privilege that may have been granted from five or ten or thirty years before, is to impose a hopelessly retroactive tax. In other words, Wisconsin in 1935, if the assessments in the case at bar are sustained, "exacts" a tax for the privilege of earning income in Wisconsin from the date the corporation first started to do business in Wisconsin, *regardless of when that date may be.*

Appellee further argues that the tax is no more retroactive than a tax upon a capital gain in the year of sale, but neither the Federal nor the Wisconsin income tax law attempts to impose a tax on a capital gain which occurred *before* the enactment of the income tax law. The Federal law accepts as the cost price for capital gain the fair market value as of March 1, 1913, the date of enactment of the federal income tax law. The State of Wisconsin accepts as the cost price for capital gain a fair market value as of January 1, 1911, the date of the enactment of the state income tax law. These dates presumably were accepted on the assumption that to take any other date would result in a vulnerably retroactive tax. In the instant case attempt is made to impose a tax for a privilege allegedly granted years before the enactment of the law so taxing.

Appellee further argues that as a tax on the stockholder the law is not retroactive and cites a series of Wisconsin income tax cases to the effect that a tax on a dividend in the hands of a stockholder declared and paid after the passage of the income tax law from surplus accumulated prior to the passage of the income tax law is not retroactive, because the dividend becomes income in the hands of the stockholder only on declaration and payment. But even

appellee has made no suggestion that the tax could be su
tained *jurisdictionally* as an income tax on a foreign stoc
holder of a forgein corporation, and obviously there is n
jurisdictional basis to sustain the law on any such h
pothesis.

We resubmit that it is perfectly clear that if the t
is in any respect sustained on the theory that jurisdicti
exists because of protection given to the earning of the i
come, that the tax is clearly unconstitutionally retroactiv

CONCLUSION.

It is respectfully submitted that for the reasons stat
in our original brief that the decisions and judgment
the Wisconsin Supreme Court should be reversed for t
reason that the law as applied to the appellant is uncons
tutional.

We further submit that appellee in its brief has not i
dicated any basis upon which the law and tax can be s
tained.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 621

MINNESOTA MINING AND MANUFACTURING COMPANY,

Appellant,

vs.

WISCONSIN DEPARTMENT OF TAXATION.

PEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN.

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

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SUPREME COURT OF THE UNITED STATES

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WISCONSIN DEPARTMENT OF TAXATION,

Appellee.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN.

APPELLEE'S STATEMENT OPPOSING JURISDICTION.

Pursuant to Rule 12, Paragraph 3, of the Rules of the Supreme Court of the United States, Appellee files this statement opposing jurisdiction.

Nature of the Case.

This is an appeal by the Minnesota Mining & Manufacturing Company from a judgment of the Supreme Court of the State of Wisconsin affirming an assessment against the Appellant of taxes for the years 1936 to 1940, both inclusive, imposed by the provisions of the Wisconsin Tax

Law, commonly referred to as the Wisconsin Privilege Dividend Tax Law, which was enacted by Laws of Wis. 1935, Ch. 505, Sec. 33, as amended by Laws of Wis. 1935, Ch. 552, and by subsequent legislative acts extended so that ever since it has been and now is presently operative.

The case was decided June 16, 1943 and is reported *Minnesota Mining & Manufacturing Company* v. *Department of Taxation*, (1943) 243 Wis. 211, 10 N. W. (2) 174, and motion for rehearing was denied September 14, 1943 (which has not as yet been reported, except in 11 N. W. (2) 96 (Adv. Sh., No. 3, October 27, 1943).

This appeal, and the decision of the Supreme Court of the State of Wisconsin from which it is taken, are an aftermath of the previous litigation in this Court in 1940 in which this same Appellant was involved and as will be explained later, the taxes against it for one of the years here under consideration was likewise involved. In January, 1940 the Supreme Court of the State of Wisconsin had before it the constitutionality of the Wisconsin Privilege Dividend Tax Law, which the Appellant here again challenges. In three companion cases, *J. C. Penney Co.* v. *Tax Comm.*, (1940) 233 Wis. 286, 289 N. W. 677; *F. W. Woolworth Company* v. *Tax Comm.*, (1940) 233 Wis. 305, 289 N. W. 685; and *Minnesota Mining & Manufacturing Company* v. *Tax Comm.* (1940) 233 Wis. 307, 289 N. W. 686; that Court in an opinion in the *J. C. Penney Co.* case, which was made applicable to and the basis of the disposition of the other two cases, felt that *Connecticut General Life Ins. Co.* v. *Johnson*, (1938) 303 U. S. 77, 58 S. Ct. 436, 82 L. ed. 673, required that it hold this Wisconsin Tax Law invalid and therefore did so. Upon certiorari in all three cases this Court, in an opinion rendered December 16, 1940 in the case involving the J. C. Penney Co. and made applicable to the other two cases, reversed the Supreme Court of Wisconsin and remanded the cases

for the determination of such questions as were open in light of this Court's opinion. *State of Wisconsin* v. *J. C. Penney Co.*, (1940) 311 U. S. 435, 61 S. Ct. 246, 85 L. ed. 267; *State of Wisconsin* v. *Minnesota Mining & Manufacturing Co.*, (1940) 311 U. S. 452, 61 S. Ct. 253, 85 L. ed. 274; *State of Wisconsin* v. *F. W. Woolworth Co.*, (1940) 311 U. S. 622, 61 S. Ct. 395, 85 L. ed. 395. The basis of this Court's reversal was a determination that the imposition of this tax is within the taxing jurisdiction of the State of Wisconsin. The taxes of the present Appellant Minnesota Mining & Manufacturing Co. that were involved in those cases were those assessed against it in respect to dividends paid during the year 1936, which taxes are likewise the taxes of one of the years involved in the present appeal.

Upon remand the cases were again heard, but the Supreme Court of the State of Wisconsin refused to reconsider the constitutionality of the statute, being bound by the decision of this Court, but did address itself to the matter of computation of the tax. It held that the tax had not been properly computed and remanded the cases for computation thereof in accordance with its opinion.

In those cases the taxes had been computed following the provision of the statute that in the absence of proof to the contrary dividends paid shall be presumed to have been paid out of earnings of the corporation of the year immediately preceding the payment of the dividend. The method of computation there used took the previous year's income of the corporation and ascertained the amount thereof attributable to Wisconsin by using the provisions of the Wisconsin Income Tax Law in Ch. 71, Wis. Stats., expressly made applicable. The percentage relationship was then applied to the dividend paid as determining the amount of Wisconsin income distributed by the dividend and the tax was then computed on that amount. As was

stated to this Court on the arguments of the cases above mentioned, if the dividends paid in a year exceeded the income of the corporation of the prior year then such excess would be deemed paid out of the next previous year's income of the corporation and the percentage of Wisconsin income to the total income of such year would be applied to determine the amount of Wisconsin income of that year distributed by the dividend. This would be continued year by year until the total dividend payment would be accounted for and the tax applied to the amount of the dividend thereby attributed to Wisconsin income. On the remand the Wisconsin Supreme Court held that the presumption of the statute that the dividend is paid out of the prior year's earnings is rebuttable and that it being shown factually that the dividends were in fact paid out of surplus this rebutted the presumption. Accordingly it held the taxes were not properly computed and remanded the cases with directions to remand to the Commissioner of Taxation for further proceedings in accordance with the opinion. In the opinion, 238 Wis. 69, at 78, 79, the Court said:

> "• • • When the company drew upon this surplus for the payment of the dividend declared, it did not draw upon 1935 income but on its entire surplus. It must be presumed, however, that when it drew upon the surplus which contained Wisconsin income, it drew upon Wisconsin income to the extent of the proportion which Wisconsin income bore not to the income for the year 1935 but to the whole amount of the surplus. The Tax Commission treated the matter as if the statutory presumption were conclusive and gave no weight or consideration to the evidence. In this the Tax Commission was in error. It is said in briefs of counsel that it would be a Herculean task to compute the amount of surplus attributable to Wisconsin income. Inasmuch as the basis upon which the Supreme Court of the United States sustained the tax is that

some part of the dividend is allocable to Wisconsin income, we see no escape from the conclusion that no tax can be levied until that fact is ascertained."

Upon the return of the record the taxing authorities of the State of Wisconsin recomputed the taxes of the three taxpayer companies involved in said cases and gave to each of them a notice of the assessment thereof. As before stated, because the tax of the Appellant Minnesota Mining & Manufacturing Company that was there involved was only in respect to taxes on dividends paid in the year 1936, the recomputation and notice of assessment of the recomputed taxes included only the taxes for that year. However, as by that time the years 1937 to 1940 had passed and the Appellant Minnesota Mining & Manufacturing Company had paid dividends during those years, an assessment was made against it for taxes upon dividends paid in 1937 and another assessment for taxes on dividends paid during the years 1938, 1939 and 1940, computing said taxes upon the basis set forth in the decision of the Supreme Court of Wisconsin on remand. This involved an analysis of the surplus of the taxpayer corporation as of the close of the year prior to the year in which the dividends were declared to ascertain the amount thereof which had been contributed by Wisconsin income and which represented Wisconsin income in said surplus. Having ascertained the percentage of relationship of Wisconsin income in surplus to the total thereof that percentage was then applied to the dividends paid in the following year to arrive at the amount of said dividends that represented a distribution of Wisconsin income and the tax rate was then applied to that result. This was the method used in the recomputation of the taxes against the J. C. Penney and F. W. Woolworth Companies. It is the method that has been used in all cases ever since the decision of the Supreme Court of Wisconsin in the cases on remand.

The Appellant Minnesota Mining & Manufacturing Co. protested the assessment which was a recomputation of its 1936 taxes and likewise protested the assessments of taxes for the year 1937 and for the years 1938 to 1940, both inclusive. The matters were heard pursuant to the provisions of the Wisconsin statutes before the Wisconsin Board of Tax Appeals, which is an administrative body created and provided for the purpose of reviewing Wisconsin tax assessments including those of the nature here involved. Because there were three separate assessments the same constituted three separate matters before that body. The recomputation of the Appellant's 1936 taxes (which were involved in the prior case before this Court) was assigned an identification number D-624; the 1937 assessment was assigned identification number D-43, and the assessment for the years 1938 to 1940, inclusive, was assigned number D-614. All three matters were then consolidated and heard as one case before the Wisconsin Board of Tax Appeals and on February 13, 1942, after hearing the matter, it rendered a decision and order affirming the assessment. Upon appeal to the Circuit Court for Dane County, State of Wisconsin, said assessments against the Appellant Minnesota Mining & Manufacturing Company were affirmed, and then the case was appealed to the Supreme Court of the State of Wisconsin, which rendered a decision on June 16, 1943, reported *Minnesota Mining & Manufacturing Co.* v. *Department of Taxation,* 243 Wis. 211, 10 N. W. (2) 174 and on September 13, 1943 denied a motion by the Appellant Minnesota Mining & Manufacturing Company for a rehearing thereon. Memorandum opinion on rehearing is not as yet reported, except in 11 N. W. (2) 96 (Adv. Sh. No. 3, October 27, 1943). It is from this decision of the Supreme Court of the State of Wisconsin that the Appellant Minnesota Mining & Manufacturing Company here appealed.

It has been previously pointed out above that this present appeal involves, along with other taxes of the Appellant for subsequent years, the taxes of 1936, which is the same year's taxes under the same law that was previously involved in the prior case before this Court on certiorari. *State of Wisconsin* v. *Minnesota Mining & Manufacturing Co.* (1940), 311 U. S. 452, 61 S. Ct. 253, 85 L. Ed. 274. It is also significant that at the same time that the Supreme Court was construing the case in which the present appeal is taken it also had before it four other cases involving various phases of this same Wisconsin Privilege Dividend Tax Law and that it rendered a decision therein on the same date as it rendered the decision in the instant case. These cases which were before that Court at that time comprised all of the attacks then being made before that court against this tax law. *International Harvester Company* v. *Department of Taxation* (June 16, 1943), 243 Wis. 198, 10 N. W. (2) 169; rehearing denied September 13, 1943, but not reported except in 11 N. W. (2) 95 (Adv. Sh. No. 3, October 27, 1943). *Wisconsin Gas & Electric Co.* v. *Department of Taxation* (June 16, 1943), 243, Wis. 216, 10 N. W. (2) 140. *Blied* v. *Wisconsin Foundry & Machine Co.* (June 16, 1943), 243 Wis. 221, 10 N. W. (2) 142. *Montgomery Ward & Co.* v. *Department of Taxation* (June 16, 1943), 243 Wis. 224, 10 N. W. (2) 176.

Statutes Involved.

The Wisconsin Statutory Tax Law here involved is as set forth in the Appellant's statement as to jurisdiction under the heading: "(c) The Statutes and Laws of the State of Wisconsin, the Validity of Which Is Involved.", and in the interest of brevity will not be repeated. It is the same statute, except that by subsequent legislative enactments it has been extended from its original expiration date of July 1, 1937 so that it continuously has since been and

is now presently operative up to and including July 1, 1945. In this connection it may be noted that the last extension of its operative effect to July 1, 1945 made by laws of Wisconsin, 1943, Ch. 367, sec. 2, changed the purpose of the statute and provides that the proceeds thereof

> "• • • shall be used to provide rehabilitation for returning veterans of World War II, construction and improvements of state institutions and other state property, and postwar public works projects to relieve postwar unemployment."

Facts.

The facts are identical with those that were presented in the prior case of *State of Wisconsin* v. *Minnesota Mining & Manufacturing Co.* (1940), 311 U. S. 452, 61 S. Ct. 253, 85 L. Ed. 274, with the exception that they not only include the year 1936, which was the only year there involved, but also include the subsequent years of 1937 to 1940, both inclusive. The facts are not in dispute and are as stated by the Supreme Court of the State of Wisconsin in *Minnesota Mining & Manufacturing Co.* v. *Department of Taxation* (June 16, 1943), 243 Wis. 211, at 213, 10 N. W. (2) 174, as follows:

> "The facts in this case are not in substantial dispute. Appellant is a Delaware corporation, with its principal office and place of business in St. Paul, Minnesota. It operates a factory at Wausau, Wisconsin, manufacturing roofing granules. This factory began manufacturing operations in 1930. Sales are made through an office in Chicago but orders are confirmed at the St. Paul office. When products so manufactured are sold, the remittances are made directly to the home office at St. Paul, and the funds from such sales are deposited in the general account of the appellant. Pay-rolls, together with pay-checks, are prepared at the St. Paul office and drawn on a Wausau bank, and a deposit equalling the amount of the pay-roll is for-

warded to the Wausau bank to cover the checks at approximately the same time that the checks representing the pay-roll are forwarded. The company reports upon a calendar year basis, closing books as of December 31, each year. It maintains one general surplus account and none of the earnings from property located, or business transacted in Wisconsin are segregated in any way. It maintains no separate balance sheet for Wisconsin operations. Dividends are declared by the Board of Directors of the company at meetings held in St. Paul; the First Trust Company of that city being the company's transfer agent. All dividends are paid to this transfer agent by check drawn upon a St. Paul bank and distributed to the stockholders by the transfer agent. Dividends are paid from surplus.

"Section 34, Delaware Corporation Law, Rev. Code 1935, § 2066, empowers corporations to declare and pay dividends either out of net assets in excess of its capital, or out of net profits for the fiscal year then current 'and/or' the preceding fiscal year.

"In making the assessments, the department of taxation analyzed the surplus on December 31st of the year preceding that in which a particular dividend was paid. In this analysis, the department went back to the date on which the corporation commenced doing business in Wisconsin for the purpose of determining (1) total surplus existing at that time, (2) the ratable contribution of earnings in Wisconsin to the surplus as of December 31st, prior to the declaration of the dividends. The department selected the close of the year preceding the payment of the dividend as the basis of its computations rather than the surplus at the time of the payment or receiving of the dividend, it being the view of the department that unless the corporation had closed its books and taken inventory at the time of the payment of the dividend (in which case analysis would have been made as of that time) it would be impossible to revise the surplus as of each dividend paying date. The dividends were paid out of the corporation's general account. There never was any at-

tempt made to ear-mark any of the earnings coming from Wisconsin or other states, although the corporation did business in all of the other states of the Union."

No Substantial Federal Question Is Here Presented.

1. *Jurisdiction to Tax.*

(a) Authoritatively settled by *J. C. Penney Co.* case.

As previously pointed out this appeal involves the same statute, the same taxpayer and the same facts (except that taxes for the subsequent years 1937 to 1940 are also here included and the method of computation of the tax is different) as in the prior case *State of Wisconsin* v. *Minnesota Mining & Mfg. Co.*, (1940) 311 U. S. 452, 61 S. Ct. 253, 85 L. ed. 274. All of the arguments here made by Appellant were presented to this Court in that case and the companion cases of *State of Wisconsin* v. *J. C. Penney Co.*, (1940) 311 U. S. 435, 61 S. Ct. 246, 85 L. ed. 267 and *State of Wisconsin* v. *F. W. Woolworth Co.*, (1940) 311 U. S. 622, 61 S. Ct. 395, 85 L. ed. 395. So far as jurisdiction of the State of Wisconsin to impose the tax is concerned, there is no difference and it is submitted that these prior decisions completely preclude there being any substantial question and dispose of the matter conclusively.

(b) No conflict exists between the decisions of this Court and of the Supreme Court of Wisconsin.

By taking excerpts from the opinions and upon a basis of labels to be put on the tax, Appellant here endeavors to spell out that there is a conflict between the decisions of this Court and of the Supreme Court of Wisconsin and assert that this presents a substantial federal question as to jurisdiction to impose the tax. The best answer to any such contention is what the Supreme Court of Wis-

consin said in its latest pronouncement on the subject in the companion case of *International Harvester Co.* v. *Dept. of Taxation,* (June 16, 1943) 243 Wis. 198, 10 N. W. (2) 169, in which a denial rehearing on September 13, 1943 has not as yet been reported except in 11 N. W. (2) 95 (Adv. Sh. No. 3, October 27, 1943).

That court was there presented with this same contention and said in that regard at 243 Wis. 198, 204-206; 10 N. W. (2) 169, 171 and 172:

> "Upon remand to determine such questions as were left open by the opinion of the United States Supreme Court, this court in *J. C. Penney Co.* v. *Tax Comm.*, 238 Wis. 69, 298 N. W. 186, (1) insisted upon its exclusive power to construe the law; (2) held the law to be a privilege tax and not an income tax; (3) held that the determination of the United States Supreme Court settled all questions as to the jurisdiction of Wisconsin to levy the tax, whatever it be called; and (4) made certain directions as to its computation. The latter point need not be elaborated in this portion of the opinion. From the briefs in this case, and the memorandum of the trial court, it appears to be concluded that we have here what the trial court designates an 'immaculate dilemma;' that the Supreme Court of the United States has held this to be an income tax, and that as such it is invalid under the Wisconsin constitution; that the Supreme Court of Wisconsin, upon remand, has persisted in designating it a privilege tax in which case the privilege being wholly exercised outside of the state, it is unconstitutional under the federal constitution.
>
> "We see no such dilemma. As we read the opinion of the United States Supreme Court, we discover no attempt by the court to usurp the function of this court so far as construing or labeling this tax is concerned. What the United States Supreme Court has done is (1) to state the factual basis upon which this law must be treated as constitutional in so far as the jurisdic-

tion of Wisconsin to levy it is concerned, and (2) to hold that given the factual basis, the law is constitutional in this aspect, regardless of the designation given it by this court. In other words, the federal supreme court has established the jurisdictional fact which is that the corporation paid the dividends in whole or in part out of property located in this state or business transacted here. If the term 'jurisdictional fact' must hereafter be relegated to the limbo of outmoded terms, the basis of Wisconsin's power to tax is the fact that it has given its protection and the benefits of government to corporate activities in Wisconsin and that profits from these activities are traceable to the fund from which dividends are paid. So far as the constitutional aspects of the cases are concerned, the federal supreme court has reduced the privilege features of the tax to mere conditions or contingencies, upon the happening of which the tax accrues.

"This being true, we perceive no conflict so long as we are talking about the power of Wisconsin to tax as against the contention that the subject of the tax is beyond her borders, and hence, beyond her jurisdiction. It makes no difference what this court calls the tax. It may, for other than constitutional reasons, be important to designate the tax a privilege tax, but the label has no bearing upon the controversy here. We adhere to our determination upon remand of the *Penney Case*, *supra*, that this is a privilege tax and that we are bound to accept the mandate of the United States Supreme Court that its constitutional justification from the standpoint of Wisconsin's power to tax is the fact of net earnings in Wisconsin traceable to the fund distributed by the dividend. Under the circumstances, we do not propose to re-examine contentions heretofore made and impliedly overruled that the law is void under the Wisconsin constitution. The constitutional question considered material and decided by this court in the original *Penney Case* involved the federal constitution and has been answered by the United States Supreme Court. We consider the matter to be closed."

This language is expressly made applicable to the instant ase by the following language of the opinion rendered he same day in this case. *Minnesota Mining & Mfg. Co. . Dept. of Taxation*, 243 Wis. 211, at p. 214, 10 N. W. 2) 169, at 175:

> "Such contentions by appellant as question the constitutionality of the privilege dividend tax as applied by the Department of Taxation are sufficiently answered by the opinion in *International H. Co.* v. *Department of Taxation, ante*, p. 198, 9 N. W. (2) —. [10 N. W. (2) 169] We proceed, therefore, to deal with contentions peculiarly applicable to this case."

c) Method of computation of the tax is of no significance.

That the taxes are computed upon an analysis of surplus asis as directed by the Supreme Court of Wisconsin nstead of by the prior method of deeming the dividends aid out of the most recent earnings of the corporation, is f no consequence. The method here used is the result of construction of the tax law by the Supreme Court of Wisconin and has no relationship to any question of jurisdiction or it is used to determine the amount of income derived rom Wisconsin that is distributed by the dividend. As said y both this Court and the Supreme Court of Wisconsin, the asis of the power to impose this tax is that the state has iven its protection and the benefits of government to cororate activities in the state and that profits therefrom are istributed by the dividends paid.

d) Deductibility of the tax from the dividend remittance was before this court in the prior cases.

Appellant makes reference to the recent decision of the upreme Court of Wisconsin in the cases *Wisconsin Gas Electric Co.* v. *Dept. of Taxation* (June 16, 1943), 243 Vis. 216, 10 N. W. (2) 140 and *Blied* v. *Wisconsin Foundry*

& Machine Co. (June 16, 1943), 243 Wis. 221, 10 N. W. (2) 142. In the first case just mentioned it was held that a corporation is not entitled under the Wisconsin income tax law to deduct privilege dividend taxes imposed against and paid by it. The second case held a stockholder is not entitled to recover from the corporation the amount of privilege dividend tax withheld by the corporation in making remittance of the dividend, basing its decision on the specific requirements of the Wisconsin Privilege Dividend Tax Law that the tax shall be so deducted and holding such statutory provisions valid. In the *Wisconsin Gas & Electric Co.* case, the opinion unequivocally points out that when this Court made its decisions in the prior cases the statute was before it and contained the provision which plainly puts the *burden* of the tax on the stockholder. But, that is not all, the provision was called to this Court's attention in those cases, and was made the basis of argument by the Respondents as establishing invalidity of the tax law.

2. *The Privilege Dividend Tax is Not a Retroactive Tax.*

Appellant urges that, because the surplus is made up of accumulated income of past years, computation of the tax by analysis of the surplus to determine the amount in the surplus that is attributable to Wisconsin sources and applying the percentage relationship thereof to ascertain the amount of the dividend which paid out of income attributable to Wisconsin sources, renders it void as a retroactively taxing of income earned prior to the enactment of this tax law. This, obviously, is entirely inconsistent with Appellant's position that the tax is a transaction or privilege tax and that as the transaction or exercise of the privilege takes place outside of the state the law is invalid as taxing something beyond the jurisdictional limits of the state.

If the tax is not an income tax, and the Supreme Court of Wisconsin says it is not, but a privilege tax, then all that occurs is the measurement of the tax by the value of the privilege. In this connection it is most important that it be kept in mind that the tax is not imposed for the privilege alone of receiving dividends out of income derived from Wisconsin income nor alone for the privilege of declaring dividends therefrom, but for *both*. Most of the erroneous concepts in reference to this tax arise from a failure to notice or appreciate the significance thereof.

This tax is not a retroactive tax. It is a tax imposed upon and at the time of an occurrence,—namely, the distribution or devolution to stockholders of corporate earnings. It is a *present* tax imposed at the time of and on a *present* transfer or devolution. It imposes the tax in the year the dividend is paid and measures the tax by the amount of the dividend that is attributable to Wisconsin sources.

It is no more a retroactive tax than the taxation of a capital gain in the year of sale of the asset, when the profit or gain results from a sale at a price in excess of the cost when purchased years prior thereto. There the tax is imposed at the time of and measured by the value of the realization of profit. So here the tax is laid at the time of the realization by the stockholder of the fruits that have grown on the corporate tree and which is the realization upon the ultimate purpose he had in owning stock in the corporation and its conducting of business for profit. It is no more a retroactive tax than when an income tax is imposed upon a stockholder for corporate dividends received by him. The dividends if paid from surplus which is made up of accumulations of income of prior years effects a distribution of such accumulations and yet the tax is not deemed retroactive. The tax here is merely measured by the amount of Wis-

consin earnings distributed and when they are utilized
such by way of dividend. For the purposes of the divid
such accumulations are still income or profit, for the
poration admittedly is not making a liquidating divid
but a regular dividend which is and must be a distribu
of its profits. Even were the tax viewed as an income
which it is not, it would be taxing the corporation on
distribution of income and the stockholder on the rec
of income. Under Appellant's own argument that the
is on the stockholder its argument would have to fall a
retroactivity for certainly then the analogy to the
recognized imposition of an income tax on the stockhol
on the dividend received would be complete.

From the foregoing it is submitted that the decis
of the Supreme Court of Wisconsin is in accord with
decision of this Court and is so plainly right as not to
quire argument, and therefore no substantial federal q
tion is presented.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 621

MINNESOTA MINING & MANUFACTURING COMPANY,

Appellant,

v.

WISCONSIN DEPARTMENT OF TAXATION,

Appellee.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN.

MOTION TO DISMISS APPEAL OR AFFIRM.

Comes now the Wisconsin Department of Taxation, Appellee herein, by its counsel below and moves this Court to dismiss, with costs, the appeal taken herein to this Court by Minnesota Mining & Manufacturing Company from the Judgment of the Supreme Court of the State of Wisconsin, dated June 16, 1943, upon the following grounds:

1. No substantial federal question is presented.

2. The decision of the Supreme Court of Wisconsin is so plainly right as not to require reargument.

In the alternative Appellee moves this Court to affirm on the ground that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

Dated this 28th day of December, 1943.

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